2003

Utah Safe to Learn-Safe to Worship Coaltion, Inc., dba Safe Havens for Learning, a Utah nonprofit corporation v. The State of Utah, a governmental entity; Olene Walker, in her official capacity as Lieutenant Governor of the State of Utah; and Mark Shurtleff, in his official capacity as Attorney General of the State of Utah : Brief of Appellant

Utah Supreme Court

Thom D. Roberts; Assistant Attorney General; Utah Attorney General's Office; Counsel for Defendants/Appellees.
John A. Pearce; Ryan M. Harris; Jones, Waldo, Holbrook and McDonough; Lisa Watts Baskin; Counsel for Plaintiff/Appellant.

IN THE UTAH SUPREME COURT

UTAH SAFE TO LEARN–SAFE TO WORSHIP COALITION, INC., d/b/a SAFE HAVENS FOR LEARNING, a Utah non-profit corporation,	:	Case No. 20030563
Plaintiff/Appellant, vs.	:	District Court Case No. 030909591
THE STATE OF UTAH, a governmental entity; OLENE WALKER, in her official capacity as Lieutenant Governor of the State of Utah; and MARK SHURTLEFF, in his official capacity as Attorney General of the State of Utah,	:	
Defendants/Appellees.	:	

BRIEF OF APPELLANT
(ORAL ARGUMENT REQUESTED)

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE J. DENNIS FREDERICK

Thom D. Roberts
Assistant Attorney General
UTAH ATTORNEY GENERAL'S OFFICE
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84111
Telephone: (801) 366-0353

Counsel for Defendants/Appellees

John A. Pearce (USB #8585)
Ryan M. Harris (USB #8192)
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101-1644
Telephone: (801) 521-3200

Lisa Watts Baskin
819 East Springwood Drive
North Salt Lake, Utah 84054
Telephone: (801) 292-5743
Counsel for Plaintiff/Appellant

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Salt Lake City, Utah 84101-1644
Telephone: (801) 521-3200

Lisa Watts Baskin
819 East Springwood Drive
North Salt Lake, Utah 84054
Telephone: (801) 292-5743

Counsel for Plaintiff/Appellant

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal. See Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented on appeal are as follows:

1. Whether the district court erred in granting Defendants' Motion to Dismiss (Justiciability), effectively ruling that no justiciable controversy exists with respect to two provisions of Utah's initiative statute.

Although neither Defendants' motion nor the district court's ruling references Rule 12(b)(6), Defendants' Motion to Dismiss (Justiciability) is grounded in that rule. This Court reviews the district court's decision *de novo*. Franco v. The Church of Jesus Christ of Latter-Day Saints, 2001 UT 25, ¶10, 21 P.3d 198. This issue was preserved in the trial court by motion. See R. at 311-13 (Defendants' Motion); id. at 326-36 (Safe Havens' opposition memorandum); id. at 411-17 (Defendants' reply memorandum); id. at 499-504 (ruling).

2. Whether the district court erred in denying Safe Havens' Motion for Summary Judgment, and in granting Defendants' Cross-Motion, effectively ruling that three provisions of Utah's initiative statute are constitutional.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c); Kouris v. Utah Highway Patrol, 2003 UT 19, ¶5, 70 P.3d 72. On appeal, "[t]he trial court's resolution of the legal issues [presented in a summary judgment motion] is accorded no deference since entitlement to summary judgment is a question of law." Kouris, 2003 UT 19, ¶5. These issues were preserved in the trial court. R. at 36-39 (Safe Havens' motion); id. at 370-410 (Defendants' opposition); id. at 337-39 (Defendants' cross-motion); id. at 434-97 (Safe Havens' reply memorandum); id. at 499-504 (ruling).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Safe Havens challenges the constitutionality of five provisions of Utah's Election Code:

- Utah Code Ann. § 20A-7-201(2)(a)(ii), which requires that sponsors of citizen initiatives obtain signatures equal to 10% of the total of all votes cast for governor in 26 of Utah's 29 Senate districts (**"the Senate District Requirement"**);

- Utah Code Ann. § 20A-7-202(4)(a), which requires sponsors of citizen initiatives to qualify their petition for the general election ballot "no later than one year after the application is filed" (**"the One-Year Requirement"**);

- Utah Code Ann. § 20A-7-202(5)(d), which requires the lieutenant governor to automatically reject, at the initial application stage, any citizen initiative that is "identical or substantially similar to" any initiative submitted to the lieutenant governor for certification within the last two years (**"the Same-or-Similar Ban"**);

- Utah Code Ann. § 20A-7-204.1, which requires sponsors of citizen initiative to notice, hold, and document "at least seven public hearings throughout Utah" in various specific locations, even before circulating the initiative for signatures (**"the Public Meetings Requirement"**); and

- Utah Code Ann. § 20A-7-205(3), which allows signers of citizen initiative petitions to remove their names from the petitions *after* the petitions have been submitted to the county clerks (**"the Signature Removal Provisions"**).

Safe Havens asserts that these statutes violate the following constitutional provisions:

- Article VI, section 1 of the Utah Constitution, which reserves to the people of the State of Utah the power to initiate legislation;

- Article I, section 24 of the Utah Constitution, which guarantees to the people of the State of Utah the uniform operation of the laws;

- Article I, section 15 of the Utah Constitution, which guarantees to the people of the State of Utah freedom of speech;

- the First and Fourteenth Amendments to the U.S. Constitution, which guarantee to the citizens of the United States freedom of speech and political expression.

Finally, Safe Havens' lawsuit was filed pursuant to the Utah Declaratory Judgment Act, Utah Code Ann. § 78-33-1 *et seq.* The full text of each of these statutes and constitutional provisions can be found in the addendum.

STATEMENT OF THE CASE

Safe Havens filed this action on April 30, 2003, seeking declaratory relief that either (a) the 2003 amendments to Utah's Election Code were not retroactive and could not be applied to its citizen initiative filed in March 2003, before the new law took effect, or (b) five separate provisions of Utah's Election Code violated both the Utah and U.S. Constitutions.

Safe Havens filed a motion for speedy hearing, and the parties stipulated to an accelerated schedule. Safe Havens filed a Motion for Summary Judgment on May 5, 2003. Defendants opposed Safe Havens' motion, and filed both a Cross-Motion for Summary Judgment as well as a Motion to Dismiss (Justiciability), asking that the district court hold that no justiciable controversy existed with respect to two of the challenged provisions, and to hold all of the provisions constitutional. During the briefing period, Defendants took the depositions of two professional initiative campaign consultants. No other discovery was had.

The motions came before the district court for hearing on June 16, 2003. Three days later, the district court granted Defendants' Motion to Dismiss (Justiciability) and Defendants' Cross-Motion for Summary Judgment and denied Safe Havens' Motion for Summary Judgment. On June 30, 2003, the district court entered a final Order and Judgment. On July 2, 2003, Safe Havens filed its Notice of Appeal.

STATEMENT OF FACTS

The Legislative Journey of the Guns-in-Schools Issue: Despite the Wishes of a Vast Majority of Utahns, the Legislature Ultimately Allows Guns in Schools

Some years ago, the Utah legislature enacted a law stating that "[a] person who possesses a weapon . . . in a public or private elementary or secondary school, on the grounds of the school, or in those parts of a building, park, or stadium which are being used for an

activity sponsored by the school is guilty of a class B misdemeanor." See Utah Code Ann. § 53A-3-502 (repealed 2003). The only exceptions were for persons who had obtained advance permission from "the responsible school administrator," or persons using the weapon "in connection with a lawful, approved activity." Id. There was no exception for persons allowed to carry concealed weapons pursuant to a state permit. Id.

In 1992, the Utah legislature enacted a conflicting law, which made it a misdemeanor to possess any dangerous weapon "on or about school premises." See Utah Code Ann. § 76-10-505.5. However, this new law created an exception for "persons authorized to possess a firearm" pursuant to a Utah concealed weapons permit. Id. At the time, though, relatively few Utahns had concealed weapons permits because an applicant was required to show "cause" to obtain a permit. See R. at 106-07 (1994 version of Utah Code Ann. § 53-5-704).

In 1995, the legislature liberalized Utah's concealed weapons law, making it possible to obtain a concealed weapons permit without demonstrating any "cause." The new law allows anyone who applies and "is of good character" to secure a permit. Utah Code Ann. § 53-5-704(1). Since 1995, the number of Utahns possessing concealed weapons permits has grown from around 1,000 to over 51,000. R. at 108 (stating that "the number of Utahns allowed to carry a concealed weapon went from 1,000 six years ago to more than 30,000" in 2001); id. at 112 (stating that there were "51,564 total valid permits as of Dec. 31, 2002").

Before and after the 1995 legislation liberalizing the concealed weapons statute was passed, representatives of the Utah PTA and other education groups informed legislators and staffers that the new law would create a conflict between the section of the Utah Code that forbids weapons in schools (53A-3-502) and one that allows concealed weapons permit holders to carry concealed weapons into schools (76-10-505.5). The legislature responded that

it was aware of the problem, but did not have time to address the issue in the 1995 legislative session, and would fix the conflict in future legislative sessions. R. at 116-17.

As time went by, however, the Utah legislature did nothing to fix the conflict. Meanwhile, education officials were unsure whether the burgeoning numbers of concealed weapons permit holders could lawfully carry their weapons into schools. Id. at 117. Beginning in approximately 1996, education groups pressed for a legislative solution to the statutory conflict. Educators (along with other groups) drafted a bill eliminating the conflict by prohibiting concealed weapons permit holders from carrying weapons into Utah schools, and obtained powerful legislative sponsors, including Senate President Lane Beattie and Rep. Dave Jones. Id.

Despite their extensive efforts, however, the education groups and their legislative allies were not able to advance the bill out of legislative committees. In most years the bill did not even progress *into* a legislative committee. See id. In fact, some legislators grew impatient with the education groups' continued efforts to address the issue through legislation, making comments such as "How many times do we have to say no?" See id. at 123 (comments of Rep. Blake Chard, R-Layton). Indeed, the legislature seemed completely unconcerned that an overwhelming majority of Utahns, when asked about the subject in numerous and varied scientific opinion polls, were in favor of banning guns from schools. See R. at 123, 125, 129, 131, 132, 135, 138 (seven scientific public opinion polls conducted between 1998 and 2001 by three polling agencies, showing that 65% to 93% of Utahns want to ban guns from schools).

In the 2003 legislative session, the Utah legislature resolved the statutory conflict regarding guns in schools by repealing Utah Code Ann. § 53A-3-502. R. at 140-46 (S.B. 108);

id. at 153 (stating that S.B. 108 passed March 3, 2003, was signed by the Governor on March 19, 2003, and became effective May 5, 2003). After the 2003 amendment, the law is now clear that, despite the apparent wishes of an overwhelming majority of Utah citizens, and despite Safe Havens' efforts that continued into the 2003 legislative session, concealed weapon permit holders may carry concealed weapons into Utah schools.

The Constitutional Alternative to an Unresponsive Legislature: The Initiative Process

The Utah Constitution states that "[a]ll political power is inherent in the people." See Utah Const. art I, § 2. The people of Utah retained unto themselves, in the state Constitution, the power to initiate legislation. Utah Const. art. VI, § 1(1) ("[t]he Legislative power of the State shall be vested in . . . the Legislature of the State of Utah; and . . . the people of the State of Utah"). In other words, the people of Utah yielded some of their power to create law to the legislature, but explicitly retained the right to make law by popular initiative. The Utah Constitution specifically reserves unto the people of Utah the power and the right to "initiate any desired legislation and cause it to be submitted to the people for adoption." Id. at art VI, § 1(2)(a)(i)(A). However, the Utah Constitution by necessity leaves to the legislature the task of enacting a statutory scheme under which the people's initiative right may be exercised. Id. at art. VI, § 1(2)(a)(i) ("[t]he legal voters of the State of Utah" may initiate legislation "in the numbers, under the conditions, in the manner, and within the time provided by statute").

In 1917, the legislature passed the first initiative statute, setting forth the conditions under which Utah citizens could place initiatives on the ballot. In that initial statute, the legislature required that initiative proponents gather signatures equal to 10% of the votes cast for all candidates for governor in the last general election, and required that proponents meet the 10% threshold statewide and in 15 of the 29 counties. R. at 156-62. In 1987, the

legislature added a signature removal requirement, granting any voter who has signed an initiative petition the right to have his or her signature removed from the petition by filing a notarized statement with the appropriate county clerk. This removal right, which still exists in the statute, does not terminate until the county clerks transmit the signatures to the lieutenant governor. R. at 163. In 1995, the legislature amended the statute to require that all signatures be submitted to the county clerks no later than "June 1 before the regular general election," and required the county clerks to check and verify all signatures during the month of June, and submit the verified signatures to the lieutenant governor's office "no later than July 1." R. at 183-88.

In 1998, the legislature toughened the multi-county requirement, increasing the number of counties in which initiative sponsors must reach the 10% threshold from 15 to 20. R. at 189. The sponsor of the amendments, Rep. Kevin Garn, defended his bill during floor debates:

> [S]ome people would suggest that this will make citizens' initiatives more difficult. My answer to that is very simple. Citizens' initiatives ought to be held to a little higher standard. The reason I say that is this is the place right here for citizens' initiatives.

R. at 190. Opponents of Rep. Garn's amendment pointed out that there was no need to make it more difficult to place initiatives on the ballot, since few initiatives even qualify for the ballot in Utah. Indeed, since 1960 only eighteen (18) citizens' measures have even qualified for the ballot, and, of those, only four (4) have been approved by a majority of Utahns in the general election. On average, then, only one citizens' initiative *per decade* manages to become law in Utah. R. at 198. However, Rep. Garn's amendment ultimately passed.

In 2002, a group of Utah citizens worked to place an initiative known as the Radioactive Waste Restrictions Act ("RWRA") on the ballot. The RWRA's sponsors obtained roughly

131,000 signatures, substantially more than the 76,180 signatures required to reach the statewide 10% threshold. County clerks verified nearly 96,000 of those signatures. See Gallivan v. Walker, 2002 UT 89, ¶¶6-11, 54 P.3d 1069. In addition, the RWRA's sponsors managed to reach the 10% threshold in 26 of the 29 counties.

At that point, however, well-heeled opponents of the RWRA obtained copies of the signatures from the county clerks, and, between June 1 and July 1, went door-to-door visiting initiative signers. The opponents, often with notaries public in tow, tried to convince the signers to recant and sign a notarized statement directing the county clerks to remove their names from the petition. Opponents successfully persuaded thousands of Utahns to remove their names from the petition, and, in so doing, reduced the number of counties in which RWRA sponsors had reached the 10% threshold from 26 to 14. Id. at ¶¶8-9. At that point, it was too late for sponsors to gather additional signatures to counter the door-to-door campaign. Because RWRA sponsors had not reached the 10% threshold in 20 counties, the lieutenant governor declared the petition insufficient and refused to certify it for the ballot. Id. at ¶11.

RWRA sponsors then filed a petition for an extraordinary writ with this Court, asking this Court to strike down the multi-county requirement as a violation of the Utah and U.S. Constitutions. On August 26, 2002, this Court granted the sponsors' requested relief, and declared that the multi-county requirement was unconstitutional because, *inter alia*, it unduly burdened the fundamental right to place initiatives on the ballot. Id.

Legislative reaction to Gallivan was harsh—several legislators went on record criticizing Gallivan and vowing to change the law. See R. at 199, 202, 204, 206 (comments of Rep. Garn, Rep. Stephens, and Sen. Mansell). In the 2003 legislative session, the legislature enacted S.B. 28, substantially revising the initiative statute. Among other changes, S.B. 28:

- reinstituted a geographic restriction, replacing the unconstitutional 20-of-29-counties requirement with the new **Senate District Requirement** mandating that sponsors meet the 10% threshold in 26 of Utah's 29 state Senate districts.
- instituted the **Public Meetings Requirement** mandating that sponsors notice, hold, and document at least seven public meetings in different cities around the state, all *before* being allowed to even circulate initiative petitions for signature.
- removed the provisions allowing initiative sponsors to use gathered signatures for two election cycles. Under the new **One-Year Requirement**, initiative sponsors must gather sufficient signatures within one year of the initiative application filing date. Sponsors who fall short of the required number of signatures will be required to re-gather all signatures the next time around.
- instituted a new requirement (**the Same-or-Similar Ban**) mandating that the lieutenant governor reject any initiative if it is "identical or substantially similar to" any initiative submitted within the last two years. This provision will potentially allow initiative proponents to file sham initiatives for the sole purpose of disqualifying future real initiatives.

Although the legislature changed many aspects of the initiative law during the 2003 revision, it specifically did not alter the **Signature Removal Provisions**. R. at 208-20 (S.B. 28).

During legislative debates on the 2003 amendments, the legislature was keenly aware of Gallivan and this Court's admonition that the initiative right could not be unduly burdened. The legislature's own attorneys issued the following warning in a "Legislative Review Note":

> In Gallivan [], the Utah Supreme Court declared that the statewide initiative is a fundamental right. In analyzing any restrictions placed upon a fundamental right by the Legislature, the court must find that there is a compelling state interest that justifies restrictions on the right. The court also declared that, because the statewide initiative is a fundamental right, the Legislature may not place an "undue burden" on the initiative right. The court's opinion also suggested that it was the Legislature's duty to "facilitate" the initiative right.
>
> . . . . [S]ome or all of [S.B. 28] could be declared unconstitutional, depending upon the opinion of a majority of justices about whether or not each provision "unduly burdens" the fundamental right of initiative or whether or not the interest the state asserts in support of the provision is "compelling."

R. at 221. Indeed, some legislators argued during the floor debates that certain features of the new initiative law did in fact impose an undue burden on the initiative right, and were likely

unconstitutional. R. at 227-28 (Sen. Thomas questioning the constitutionality of the One-Year Requirement); id. at 231-32 (Sen. Stephenson questioning the constitutionality of the Same-or-Similar Ban, largely because of a concern about sham initiatives, and stating that if the ban were enacted, the legislature would be "holding the people to a different standard than we hold ourselves"); id. at 235 (Sen. Valentine questioning the constitutionality of the Public Meetings Requirement); id. at 247 (Sen. Hale questioning the constitutionality of the Public Meetings Requirement); id. at 237, 247-48 (Sen. Mayne stating that the entire bill was "worth[y of] the junk pile," noting that the Senate District Requirement would have "a very chilling effect on the initiative process," and warning that the result of passing the bill would be that "citizens will hardly ever, ever have an opportunity to address their government through the initiative process"); id. at 253, 257 (Rep. Becker stating that the new law makes the initiative process "so difficult that my guess is, unless someone comes in with an enormous amount of money, they will never get an initiative on the ballot," and cautioning that if the bill passes "we're going to be [in] court within six months, and the chances of us succeeding, if you look at the Constitutional note, probably aren't that great"); id. at 259-60 (comments of Rep. Philpot).

Despite these warnings, the legislature passed the bill. Some of the bill's supporters clearly articulated their rationale for making it harder to place initiatives on the ballot. Rep. Noel stated that "we have a representative form of government," not direct democracy, that initiatives are "the exception to the rule," and that law should be made by the legislature, not by the people directly, because citizens aren't generally capable of understanding the law:

> We are elected to represent the people. I found out in the . . . little short time here, it is very, very difficult to understand all of the intricacies, the nuances that go along with this legislation. You have to sit down and study it and read it and see how it affects the law. And when we go out to the people, it's very difficult for them to understand it. And they base their decisions on emotion and not on

> facts. We have been elected to do that. . . . I think it's a benefit to the people of . . . Utah that only four initiatives have passed because that's the exception to the rule. We shouldn't be having initiatives passed every couple years.

Id. at 263-64. S.B. 28 was passed by both houses of the legislature, and was signed into law by Gov. Leavitt. The law took effect on May 5, 2003. R. at 152. Two professional political consultants with extensive experience coordinating initiative campaigns in Utah—and whose depositions were noticed and taken by Defendants in this matter—agree that the new statutory scheme is more burdensome for citizen initiatives than the scheme Gallivan struck down, and that the legislature, through the passage of S.B. 28, has made it more difficult for citizens to initiate desired legislation. R. at 475-76, 490-92; see also infra Note 1.

Safe Havens' Efforts to Use the Initiative Process

After meeting with stiff resistance in the legislature throughout the 1990s, education groups in favor of banning guns from schools decided to avail themselves of their fundamental right to place the issue directly before the people. In 1999, they drafted an initiative, filed it with the lieutenant governor, and began to gather signatures. R. at 117-18. The education groups, joined in their efforts by a coalition of other interests including certain religious groups, attempted a grass-roots volunteer-based effort. The coalition made the decision early on in the process to concentrate its efforts in the rural counties, believing that the hardest part of the process would be to reach the 10% threshold in 20 counties. R. at 118-19.[1]

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[1] This belief was borne out by depositions noticed and taken by Defendants in this matter. Defendants deposed Richard Arnold, a political consultant who was in charge of gathering signatures for the 2000 English as the Official Language initiative campaign, and John Michael, a petition drive coordinator who was in charge of gathering signatures for the 2000 Utah Property Protection Act initiative campaign and the 2002 RWRA initiative campaign. Both deponents testified that it was extremely difficult and expensive, under Utah law in effect in 2000 and 2002, to obtain the signatures necessary to place an initiative on the ballot. Both (continued...)

Despite many hours of volunteer labor, however, the coalition was unable to reach the 10% threshold in a sufficient number of rural counties, and therefore did not expend a great deal of effort along the Wasatch Front. The coalition believes that it could have reached the 10% *statewide* threshold if it had expended the resources. Still, the coalition was able to gather over 34,000 signatures, and, under the law then in effect, was allowed to use signatures for two election cycles. The coalition then readied itself for the 2002 ballot. R. at 119-20.

This time, the coalition decided to pay, on a part-time basis, several college students to gather signatures in the rural counties. The coalition, true to its grass-roots, did not hire a signature-gathering company nor professional signature gatherers. Throughout 2001 and early 2002, these college students, alongside numerous volunteers, attempted to gather signatures throughout the state. R. at 120, 267-68. Still, the coalition failed to meet the 10% threshold in a sufficient number of rural counties. Once again, it decided not to spend the resources along the Wasatch Front until it actually met the multi-county requirement, and, because it could not meet the multi-county requirement, it did not spend the resources along the Wasatch Front. Still, the coalition submitted over 41,000 verified signatures. See R. at 120, 268-69.

In March 2003, in the wake of both the Gallivan opinion and the legislature's 2003 amendments, the education groups, this time under the name "Safe Havens for Learning," filed

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[1] (...continued)
testified that a successful initiative campaign requires the hiring of "hundreds of people" to gather signatures and complete other tasks, and requires an ultimate cash reserve of between $200,000 and $500,000. R. at 473, 493. Both deponents stated that Utah's statutory scheme is among the most restrictive in the country, if not the most restrictive, id. at 476, 495, and both stated that, although they have not yet attempted to qualify an initiative under Utah's new statutory scheme, in their opinion the new scheme was ***more difficult*** for initiative sponsors, id. at 475-76, 490-92. Both testified that it was virtually impossible, under Utah's system, for an all-volunteer initiative campaign to succeed. Id. at 474, 493-94.

a new initiative with the office of the lieutenant governor. Safe Havens filed on March 21, 2003, before S.B. 28 took effect, in hopes of qualifying for the ballot under the post- Gallivan framework. See R. at 121, 270-71. Soon after filing its application to circulate a petition, however, Safe Havens was informed by Utah elections officials that it would be required to comply with the new requirements of S.B. 28. See R. at 272.

Safe Havens disagreed with this position, because its initiative was filed and approved before the new law took effect, and therefore filed this lawsuit on April 30, 2003. R. at 1. Soon after the complaint was filed, Lt. Governor Walker sent a second letter to Safe Havens, informing them that, contrary to the earlier statement, two of the new provisions (the Public Meetings Requirement and the Same-or-Similar Ban) would *not* be applied to Safe Havens' petition, but that the balance of the new law would be applied retroactively. R. at 322.

After briefing on the motion to dismiss and the motions for summary judgment, the district court determined that there was no justiciable controversy with respect to the Public Meetings Requirement and the Same-or-Similar Ban because Defendants had decided not to apply those provisions to Safe Havens' initiative. In addition, the district court determined that the other three challenged provisions (the Senate District Requirement, the One-Year Requirement, and the Signature Removal Provisions) were constitutional. This appeal ensued.

SUMMARY OF THE ARGUMENT

First, the district court erred by refusing to declare that the 2003 amendments to the Election Code can only be applied prospectively. Nothing in the new law states that it is to be applied retroactively, and statutes are presumed prospective in the absence of contrary legislative instruction. A ruling in favor of Safe Havens on this point would moot four of the five constitutional challenges.

Second, the district court erred in granting Defendants' Motion to Dismiss (Justiciability). The district court held that there is no justiciable controversy with regard to two of Safe Havens' constitutional challenges, because Defendants' current position is that they do not intend to apply the Public Meetings Requirement or the Same-or-Similar Ban to Safe Havens' initiative. The district court erred, however, because there is a substantial likelihood that an actual controversy will develop between these parties on these issues, and therefore under this Court's precedent there is a justiciable controversy.

Third, the district court erred in holding the challenged provisions constitutional. All five of the challenged provisions violate the Utah and/or the U.S. Constitutions. In Gallivan, this Court declared that the citizens' right to initiate legislation is a fundamental right that cannot be unduly burdened. Despite this pronouncement, the legislature has passed a new law that contains certain provisions that unduly burden the right to initiate legislation. In addition, the challenged provisions also violate initiative sponsors' free speech rights.

Finally, if this Court strikes down some or all of the challenged provisions, the final issue to be decided concerns severability. Four of the five challenged provisions are clearly severable from the remainder of the statute; the legislature's intent regarding the Senate District Requirement is also clear from specific statutory language. This Court can follow the legislature's severability clause and strike all five of the challenged provisions.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS (JUSTICIABILITY) AND IN FAILING TO DECLARE THAT THE 2003 AMENDMENTS ARE PROSPECTIVE

Safe Havens filed its latest initiative—entitled "Safe Havens for Learning"—on March 21, 2003, well before S.B. 28's May 2003 effective date. Under retroactivity rules, a party is

entitled to take advantage of the law at the time it files its action. Therefore, Safe Havens should be held to the statutory scheme in effect at the time it filed its initiative application.

A. Retroactivity

"Amendments to statutes are prospective only unless expressly made retroactive." State v. Abeyta, 852 P.2d 993, 995 (Utah 1993); see also In re Disconnection of Certain Territory, 668 P.2d 544, 549 (Utah 1983) ("[t]he well-established general rule is that statutes not expressly retroactive should only be applied prospectively"). The Utah Code is explicit on this point, stating that "[n]o part of these revised statutes is retroactive, unless expressly so declared." Utah Code Ann. § 68-3-3. S.B. 28 does not provide for retroactive effect.

Parties are entitled to "have [their] rights determined on the basis of the law as it existed at the time of the occurrence." Okland Constr. Co. v. Industrial Comm'n, 520 P.2d 208, 210 (Utah 1974); see also Carlucci v. Utah State Indus. Comm'n, 725 P.2d 1335, 1337 (Utah 1986) (stating that "[t]he general rule is that the law establishing substantive rights and liabilities when a cause of action arises, and not a subsequently enacted statute, governs the resolution of the dispute"). Accordingly, Safe Havens should be allowed to proceed with qualifying its initiative for the ballot under the statutory scheme in effect in March 2003.

Ignoring this precedent, Defendants take the position that there are *two*, not one, dates on which government action must be taken with respect to citizen initiatives—one date on which the government must decide whether to approve the petition for circulation, and one date on which the government must decide whether to certify the petition for the general election ballot. Defendants' position is that, if the law changes between those two dates, those portions of the new law that concern the final certification (rather than the initial approval) of a citizen initiative can be applied retroactively to the initiative petition.

In this case, the law at the time Safe Havens' application was approved for circulation did not contain the Public Meetings Requirement or a Same-or-Similar Ban, so Defendants maintain that those two provisions of the new law do not apply to Safe Havens' petition. However, because the law at the time Safe Havens will submit its signatures for final certification *will* contain a Senate District Requirement and a One-Year Requirement, Defendants maintain that those provisions are applicable to Safe Havens' petition. Defendants have since explained, in legal briefing before the district court, that this opinion is based on Owens v. Hunt, 882 P.2d 660, 661 (Utah 1994), a case whose narrow holding is that municipal initiative sponsors' "entitlement or ***right to an initiative election*** did not accrue until the initiative petition containing a proper number of certified signatures was filed." Id. (emphasis added). Defendants read far too much into the brief Owens opinion.

In Owens, proponents of a municipal initiative (proposed only for the city of St. George) filed an initiative application with the city recorder on April 6, 1994. At that time, then-existing law "arguably permitted the submission of the [municipal] initiative to voters at the next county-wide election," which was to occur in November 1994. Id. In the 1994 session, however, the legislature amended the statute to provide that municipal initiatives may only be placed on the ballot in municipal elections, the next one of which was to occur in November 1995. Id. The statutory amendment did not take effect until May 2, 1994, after the municipal initiative had been filed. Id. The initiative sponsors argued that they should be able to avail themselves of the law in effect at the time their initiative was filed. On appeal, this Court disagreed. Id.

In Owens, however, the statutory amendment had nothing at all to do with the signature-gathering and initiative-qualifying process; rather, it had solely to do with the date

on which the initiative would eventually be placed on the ballot. The sponsors of the St. George initiative were not subject to two separate statutory schemes regarding the particular requirements of gathering signatures and placing an initiative on the ballot. Under both the pre-1994 and post-1994 statutory schemes, the mechanism for placing the initiative on the ballot was the same; the only issue concerned when the measure would appear on the ballot.

In this case, by contrast, the 2003 amendments have everything to do with the mechanism for gathering signatures. At the time Safe Havens filed its initiative application, it was not necessary to gather signatures in 26 of 29 state Senate districts—under the law as articulated after Gallivan, sponsors needed to reach a 10% threshold statewide, but did not have to reach that threshold in a certain number of counties or Senate districts.[2] In this case, but not in Owens, the legislature changed the signature-gathering rules in mid-stream.

In other words, Owens does not concern the right to certainty regarding ***the process*** under which the sponsor is to obtain the requisite number of verified signatures; Owens concerns only the entitlement to an election once the process has been met. Moreover, the policy concerns at issue here—allowing the citizens of Utah to exercise their initiative right with some certainty that new requirements will not be imposed upon them in mid-stream—were not the policies implicated in Owens. Indeed, if Defendants are correct, Owens allows the legislature to make Utahns the modern Sisyphus, forever rolling a rock up a hill just to have it slide back down. The legislature could ensure that any given initiative would never reach the ballot simply by changing the qualification requirements while

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[2] In addition, under the law in effect in March 2003, sponsors were not limited to a one-year time window in which to collect signatures; rather, sponsors had two full election cycles to gather and submit signatures before a re-filing became necessary.

signatures are being gathered. Alternatively, the lieutenant governor could arbitrarily choose which procedural mechanisms apply retroactively, and could act as a gatekeeper in situations where the legislature does not fully articulate its intent.

In any event, Owens must be re-examined in light of this Court's ruling in Gallivan. In Gallivan, as discussed above, this Court declared that the right of Utahns to initiate desired legislation was a fundamental right than may not be unduly burdened. See Gallivan, 2002 UT 89, ¶24, 54 P.3d 1069. Surely a scheme under which the Utah legislature would be free to change the rules on initiative sponsors in mid-stream, during the signature gathering process, is an undue burden on the fundamental right. In order to be able to fully exercise their fundamental right to initiate legislation, Utahns must have certainty when beginning the signature gathering process that the rules will not materially change during the process.[3]

For these reasons, Owens does not prevent this Court from determining that Safe Havens is required to comply only with the requirements in effect on the date it filed its initiative application, and is not required to comply with the 2003 legislative amendments.[4]

B. Justiciability

Defendants maintain, and the district court agreed, that there is no justiciable controversy regarding the Public Meetings Requirement and the Same-or-Similar Ban, because

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[3] Indeed, Safe Havens submits that Owens was wrongly decided, given this Court's retroactivity jurisprudence. Initiative proponents, no less than litigants, are entitled to certainty regarding the rules of the process, and are entitled to "have [their] rights determined on the basis of the law as it existed at the time of the occurrence," Okland Constr., 520 P.2d at 210, which by rights should be the date on which the application was filed.

[4] If this Court determines that the 2003 amendments are not retroactive, all but one of Safe Havens' constitutional challenges will be mooted. The one that will remain justiciable is Safe Havens' constitutional challenge to the Signature Removal Provisions, because the Signature Removal Provisions stem from the old statute, and not from the 2003 amendments.

Defendants are not applying those requirements to Safe Havens. This position is erroneous.

As an initial matter, Utah courts are not constrained by any "case or controversy" requirement. "Unlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the United States Constitution requiring 'cases' or 'controversies,' since no similar requirement exists in the Utah Constitution." Jenkins v. Swan, 675 P.2d 1145, 1149 (Utah 1983). Rather, justiciability issues are governed by Utah's Declaratory Judgment Act, which "is to be liberally construed and administered" so that litigants may be afforded "relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Utah Code Ann. § 78-33-12. This Court "read[s] this section as allowing for a *wide interpretation* of what constitutes a 'justiciable controversy.'" Salt Lake County Comm'n v. Salt Lake County Attorney, 1999 UT 73, ¶12, 985 P.2d 899 (emphasis added); see Salt Lake County v. Salt Lake City, 570 P.2d 119, 121 (Utah 1977) ("the court will be indulgent in entertaining actions brought to achieve [the purposes of the Declaratory Judgment Act, especially] where there is a substantial public interest to be served by the settlement of such an issue").

A justiciable controversy exists "if: (i) the parties are adverse; (ii) the party seeking relief has or asserts a bona fide claim; and (iii) the issues are ripe for adjudication where it appears 'there is an actual controversy, or that there is a *substantial likelihood that one will develop so that the adjudication will serve a useful purpose in resolving or avoiding controversy or possible litigation.*'" Id. (citations omitted) (emphasis added).

In this case, there is no real dispute regarding the first two elements of the test—the parties are adverse, and Safe Havens asserts a bona fide (and not a sham or manufactured) claim against Defendants. Defendants maintain, however, that there is not a "substantial

likelihood" that an actual controversy will develop regarding the Public Meetings Requirement and the Same-or-Similar Requirement.

Contrary to Defendants' argument, there is at least a "substantial likelihood" that an actual controversy will develop, and the adjudication of the claims will serve a useful purpose in avoiding future litigation. Safe Havens is committed to the cause of placing its initiative on the ballot. As evidenced by its several attempts, if it fails this time, it will try again. If it tries again, it will be required to comply with the Public Meetings Requirement and the Same-or-Similar Ban. These matters will eventually be adjudicated, and it would be a poor use of judicial and litigant resources to force these same litigants to come back later. The parties are already here, and Safe Havens has already briefed the issues for the Court. This Court can, and should, adjudicate all of the claims presented by Safe Havens in this matter.

II. THE DISTRICT COURT ERRED IN RULING THAT THE CHALLENGED PROVISIONS OF UTAH'S INITIATIVE STATUTE DO NOT VIOLATE THE UTAH CONSTITUTION

The district court also erred by refusing to grant Safe Havens' Motion for Summary Judgment regarding the constitutionality of the challenged provisions of the Election Code. The district court held that the three challenged provisions currently being applied to Safe Havens (the Senate District Requirement, the One Year Requirement, and the Signature Removal Provisions) were constitutional, and granted Defendants' Cross-Motion for Summary Judgment. This ruling was error, because all five of the challenged provisions violate Article VI, section 1, and Article I, sections 24 and 15 of the Utah Constitution.

A. Defendants Bear the Burden of Proving That the Challenged Provisions Are Constitutional

As an initial matter, because the interests at stake are specifically protected by the Utah

Constitution, the presumption of validity that normally attaches to legislative acts does not attach to the challenged provisions. In cases involving statutes which implicate specific constitutional rights, this Court has stated that

> [b]ecause the interests at stake are specifically protected by the constitution, the presumption of validity that normally attaches to legislative action must be reversed once it is shown that the enactment under scrutiny does, in fact, infringe upon the interests in article I, section 11. The burden is then upon the proponents of the legislation's validity to demonstrate that its restrictions on those rights are carefully drawn and supported by weighty considerations.

Lee v. Gaufin, 867 P.2d 572, 582 n.15 (Utah 1993) (quoting Condemarin v. University Hosp., 775 P.2d 348, 368 (Utah 1989) (Zimmerman, J, concurring)); see also Wood v. University of Utah Med. Ctr., 2002 UT 134, ¶46, 67 P.3d 436 (a shifting majority of Justices Durham, Russon, and Howe reaffirming the reversal of the presumption of validity in cases involving statutes implicating specific constitutional rights); Currier v. Holden, 862 P.2d 1357, 1362 (Utah Ct. App. 1993) (stating that because the challenged statute impacts a constitutional right, "the usual presumption of validity does not control our review of the statute"). This line of cases is not limited to the Article I, section 11 context—in Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199 (Utah 1984), this Court stated that "the proponent of legislation infringing" a fundamental right must show that the legislation is constitutional. Id. at 206.

In Gallivan, this Court declared that "[t]he reserved right and power of initiative is a fundamental right under article VI, section 1 of the Utah Constitution."[5] Gallivan, 2002 UT

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[5] Removal of the presumption of validity is particularly important in the initiative context. Because the Utah Constitution makes the legislative power of the people and the legislature coequal, any regulation of the initiative right automatically changes the balance of law-making power between the people and their representatives. In this zero-sum scenario, it is especially appropriate for the restriction's proponents to bear the responsibility of proving the need for any encroachment on the people's legislative power. See Gallivan, 2002 UT 89, ¶59 n.11 (the (continued...)

89, ¶24 (citations omitted). There can be no doubt that the statutory provisions challenged here place restrictions upon interests "specifically protected by the constitution," and, therefore, the usual presumption of constitutionality is reversed. The burden falls to Defendants to demonstrate that the challenged provisions are "carefully drawn" and "supported by weighty considerations." Defendants cannot meet this burden.

B. The Challenged Provisions Violate Article VI, Section 1 of the Utah Constitution, Which Reserves to the People the Right to Initiate Legislation

The Utah Constitution provides that "[a]ll political power is inherent in the people and all free governments are founded on their authority." Utah Const. art I, § 2. The people of the State of Utah reserved and guaranteed to themselves the right to create law by initiative. See Gallivan, 2002 UT 89, ¶23. In Article VI, section 1 of the Utah Constitution, the people delegated a portion of their law-making power to the legislature, but reserved to themselves a right to "initiate any desired legislation." In Gallivan, this Court declared that the citizens' right to initiate legislation "is a fundamental right under article VI, section 1 of the Utah Constitution." Gallivan, 2002 UT 89, ¶24 (citations omitted). This Court emphasized that "[t]he power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity." Id. at ¶23.

Because the initiative right is fundamental, and coequal with the legislature's own power to make law, the legislature "can and is required to enact legislation that *implements* and *enables* the exercise of the people's right to initiative." Id. at ¶27 (emphasis added). The

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[5] (...continued)
initiative process "has a different character in our constitutional system than the direct legislative process in that the direct initiative process may be considered a constitutional check on the representative legislature if it fails to enact widely supported legislation").

legislature may not and must not "pass laws that *unduly burden or diminish* the people's right to initiate legislation." Id. (emphasis added); accord Owens, 882 P.2d at 661 (legislature cannot pass laws that impose an "unreasonable restraint on the rights of the electorate" to legislate through initiative). This Court has reaffirmed its duty to defend "the people's right to directly legislate through initiative . . . against encroachment." Gallivan, 2002 UT 89, at ¶27.

In Gallivan, the Court struck down the requirement that proponents gather signatures in 20 of Utah's 29 counties equal to 10% of the persons who voted in each county in the last gubernatorial election (the "multi-county requirement"). Id. at ¶64. The Court found, *inter alia*, that the multi-county requirement imposed an impermissible burden on the initiative right. Id. at ¶¶49-50, 53-54, 62 ("the multi-county signature requirement unduly hinders the ability to get initiatives on the ballot"). However, the Court also found that the multi-county requirement was infirm because it weighted rural signatures more heavily that than urban signatures, presenting a problem under the uniform operation of laws clause of the Utah Constitution. Gallivan, 2002 UT 89, ¶45.

In this case, the challenged provisions do not create impermissible or suspect classifications among Utah citizens, and therefore do not present the same uniform operation of laws issue as the provisions challenged in Gallivan. Here, by contrast, the legislature has enacted statutory provisions that make it much more difficult for *all* Utahns to place initiatives on the ballot. The first issue for this Court is which constitutional test governs this situation.

Because this case presents the first post-Gallivan constitutional challenge brought directly under Article VI, section 1, there is little guiding precedent regarding the appropriate constitutional test to be applied. Safe Havens suggests two different tests, and maintains that the challenged provisions are unconstitutional under either.

1. The challenged provisions are unconstitutional under an "undue burden/enabling" test.

Safe Havens first suggests a test drawn from the language in Paragraph 28 of Gallivan, which Safe Havens herein refers to as the "undue burden/enabling" test. The essential question is whether the challenged restrictions comport with this Court's instruction that "the legislature can and is required to enact legislation that implements and enables the exercise of the people's right to initiative," and does not "unduly burden or diminish the people's right to initiate legislation." See Gallivan, 2002 UT 89, ¶28. The legislation passes the test if it facilitates and enables the initiative right, but fails the test if it imposes undue burdens on the initiative right, or was intended simply to make the process harder for Utah citizens.[6] Each of the challenged provisions fails under this test, because each one imposes undue burdens on the initiative right, and none enables or facilitates the right.

The Public Meetings Requirement imposes severe restrictions upon initiative-related speech and expression in Utah. This requirement substantially and without real justification increases the costs of qualifying an initiative for the ballot,[7] making it accordingly less likely

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[6] The "undue burden/enabling" test suggested by Gallivan's text is akin to the "undue burden" test applied by federal courts in the abortion context. In Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992), the U.S. Supreme Court stated that the right of a woman to abort an unviable fetus cannot be unduly burdened, and that a statute imposes an undue burden if it has "the purpose *or* effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." See id. (emphasis added) (as discussed by this Court in Wood, 2002 UT 134, ¶17, 67 P.3d 436). As the following discussion demonstrates, the challenged provisions of Utah's Election Code have the purpose ***and*** the effect of placing substantial obstacles in the path of Utahns who seek to place an initiative before the people, and therefore place an undue burden on the fundamental right of Utah citizens to initiate desired legislation.

[7] For example, this requirement forces sponsors to spend several weeks, at the beginning of the initiative campaign, traveling throughout the state holding meetings, and thereby (continued...)

that citizens will begin the effort of attempting to qualify an initiative for the ballot.

The Senate District Requirement imposes a severe burden on the fundamental right of Utahns to initiate legislation. As discussed more fully below, to pass a statute through the Utah Senate, proponents need secure the votes of only 15 Senators—indeed, placing a constitutional amendment before the electorate requires the votes of only 20 Senators.[8] Yet, to place an initiative on the ballot, sponsors must reach a 10% threshold in 26 Senate districts.

The burdens imposed by the Senate District Requirement are magnified when viewed in conjunction with the Signature Removal Provisions, which the 2003 Legislature left untouched from the previous statute. Those provisions allow initiative opponents unfettered access to petition signers during the month of June (after sponsors are prohibited from submitting additional replacement signatures), during which time signers may remove their names from the petition. Those provisions, coupled with the Senate District Requirement, allow initiative opponents to focus on one or two (or at most, four) Senate districts in which sponsors have cleared the 10% hurdle by the narrowest margin. By selecting the right Senate districts, initiative opponents can, in one month and with far fewer resources, undo all of the sponsors' hard work and tens of thousands of signatures by persuading several hundred

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[7] (...continued)
substantially increasing the number of person-hours required to qualify an initiative for the ballot. Sponsors must take time off from their jobs for these days and weeks to attend these meetings. Sponsors must rent public meeting halls in seven cities around the state. Sponsors must hire stenographers, videographers, or other transcription services to record and document the meetings. Sponsors must advertise the meetings in local newspapers, but must also notify legislators and other local elected officials individually and specifically, in a manner separate from the notice provided to the general population.

[8] In essence S.B. 28 operates as a *de facto* amendment of the Utah Constitution. Because S.B. 28 makes it difficult, if not impossible, for most Utahns to exercise their law-making power, the statute effectively edits the initiative right out of the Constitution.

strategically-placed signers to remove their names from the petition.

The Same-or-Similar Ban imposes undue burdens on the initiative right, and amounts to an outright ban on certain initiatives merely because identical or similar initiatives have been suggested in the past. The Utah statute takes certain subjects, which are usually the more hotly-debated subjects in the state, and imposes an outright ban on those subjects for two years, cutting sponsors off before they even are able to begin speaking about the subject.[9]

Finally, the One-Year Requirement imposes a severe burden on initiative sponsors, especially sponsors of all-volunteer initiative campaigns. Under the new provision, initiative sponsors have only one year to gather the required number of signatures, and the penalty is high if they fall short—sponsors who spend a whole year gathering signatures and come up just short will be required to throw all of their signatures out, and start from scratch.

The restrictions imposed by the new statute are even more burdensome than the restrictions imposed by the pre-Gallivan statutory scheme, which included the unconstitutional multi-county requirement. R. at 475-76, 490-92 (testimony of Mr. Arnold and Mr. Michael).

There can be little doubt that the challenged provisions are intended to doom, rather than facilitate, the creation of law by initiative.[10] Legislative history confirms any suspicion

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[9] This provision will also encourage the filing of sham initiatives, whereby initiative opponents, in an effort to pre-empt legitimate citizen initiatives, will file initiatives on a certain topic, make only token efforts to gather signatures, and submit those signatures. Such a maneuver could effectively keep certain initiatives off the ballot for a two-year period.

[10] In addition to placing undue burdens on initiative sponsors, the Senate District Requirement will also place additional burdens on the county clerks and on the lieutenant governor. Under the new scheme, the county clerks will be required to verify that each petition signer resides in a particular Senate district. The burdens on the county clerks in the urbanized Wasatch Front counties, where each county contains multiple Senate districts, will be markedly increased. In addition, it may be literally impossible for the lieutenant governor's office to come up with the magic number of required signatures in each Senate

(continued...)

concerning the legislature's motivation for placing draconian restraints on the process. See R. at 190, 192, 196, 263-64 (legislative floor debates in which legislators spoke openly about their intention to make it more difficult to place an initiative on the ballot); id. at 227-28, 231-32, 235, 237, 247-48, 253, 257, 259-60 (legislative floor debates in which some legislators warned that S.B. 28 was unduly burdening the initiative right). In light of the legislative history and the substance of the restrictions themselves, Defendants cannot plausibly argue that these amendments were designed to facilitate the initiative right.

The challenged provisions were designed to throw stumbling blocks in the path of citizens who want to place issues before the voters of Utah. Under Gallivan and Article VI, section 1 of the Utah Constitution, these restrictions cannot stand as a matter of law.

2. The challenged provisions are unconstitutional under the "heightened scrutiny standard" found in this Court's fundamental rights jurisprudence.

The next alternative test suggested by Safe Havens is drawn from this Court's jurisprudence in other "fundamental rights" cases, most notably cases arising under the uniform operation of laws clause (Article I, section 24) and the state due process clause (Article I, section 7). In these cases, this Court has applied heightened scrutiny to provisions that impact "fundamental rights," upholding such provisions only if they actually and substantially further a legitimate legislative objective and are reasonably necessary to further that objective. The challenged provisions are unconstitutional under this test.

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[10] (...continued)
district, given the massive redistricting that has occurred since the 2000 general election. The statute requires that the lieutenant governor provide, "to any interested person," the "total of all votes cast in [each Utah State Senate district] for all candidates for governor." See Utah Code Ann. § 20A-7-201(3)(b). This number may literally be un-ascertainable, imposing a burden upon the chief election officer that is severe and undue.

In the uniform operation of laws context, this Court has stated that legislation is unconstitutional if it "infringes a fundamental or critical right." Peterson v. Coca-Cola USA, 2002 UT 42, ¶23, 48 P.3d 941 (citations omitted); accord Gallivan, 2002 UT 89, ¶41; Ryan v. Gold Cross Services, 903 P.2d 423, 525 (Utah 1995). If the law impacts a fundamental or critical right, the law is constitutional under the uniform operation of laws provision only if it: "(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective, and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal." Gallivan, 2002 UT 89, ¶42.[11]

In the due process context, this Court applies a similar but slightly different test. This Court has long since identified certain rights, including parental rights, as "'fundamental' for purposes of due process," see Wells, 681 P.2d at 206, and legislation that infringes fundamental rights is constitutional only if the proponent of that legislation can "show (1) a compelling state interest in the result to be achieved and (2) that the means adopted are 'narrowly tailored to achieve the basic statutory purpose.'" Id. (citations omitted).

The right to initiate legislation is a fundamental right under the Utah Constitution. See Gallivan, 2002 UT 89, ¶¶25, 27. Thus, legislative enactments that impact the right to initiate legislation are to be considered under the heightened scrutiny standard and pass muster only if they are reasonably necessary to further a legitimate legislative purpose. None of the

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[11] Safe Havens has brought a direct challenge in this case under the uniform operation of laws clause, even though no discriminatory classification is at issue here, because much of this Court's jurisprudence states that a uniform operations challenge may be brought when a fundamental right is impacted. R. at 17 (complaint); R. at 76-87 (briefing on the issue below). Safe Havens recognizes that this concept may appear in the Article I, section 24 case law because Utah's uniform operations of law clause is commonly characterized as the Utah analogue to the 14th Amendment of the U.S. Constitution. Safe Havens further recognizes that the fundamental rights portion of the Article I, section 24 case law might also be viewed as a substantive due process challenge under Article I, section 7 of the Utah Constitution.

challenged provisions are constitutional under either test.

a. *There is no legitimate legislative purpose underlying the challenged provisions.*

Defendants bear the burden of showing that there are legitimate legislative purposes underlying the challenged provisions.[12] Defendants will be unable to meet this burden as a matter of law because the justifications they can offer in defense of the restrictions will be either facially pretextual or already rejected by this Court.

The Senate District Requirement and the Public Meetings Requirement. The floor debates in the 2003 Legislature reveal that the legislature's apparent purpose in enacting the Senate District Requirement and Public Meetings Requirement was to make Utahns living outside the Wasatch Front gatekeepers for the initiative process.[13] See R. at 234, 263 (comments of Sen. Dmitrich, Rep. Buttars, and Rep. Noel). From these comments, it is clear that the Legislature wanted the Senate District Requirement and Public Meetings Requirement to ensure that any issue that qualifies for the ballot has support in areas of Utah outside the Wasatch Front. This legislative purpose is invalid for several reasons.

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[12] The first factor from the uniform operation of laws test—whether the restrictions are "reasonable"—has, to Safe Havens' knowledge, never been definitively applied or explained by this Court in the context of heightened scrutiny. The requirement appears to have been taken from Justice Stewart's concurrence in Condemarin, where he stated that "[t]he determination of reasonableness must take into account the extent to which the constitutional right is . . . diminished and the extent to which the burden imposed actually furthers the legislative goals, as well as the importance of those goals." Lee, 867 P.2d at 582 (quoting Condemarin, 775 P.2d at 373 (Stewart, J. concurring)). To some degree, this requirement collapses into the other two prongs of the Lee test; in fact, the Lee court did not separately analyze the reasonableness of the challenged statute.

[13] Defendants will likely argue that the Public Meetings Requirement is also justified by the legislative purpose of promoting an informed electorate. Safe Havens agrees that this may be a legitimate aim, but, for the reasons discussed below, the Public Meetings Requirement actually thwarts that purpose and is therefore not reasonably necessary and is unconstitutional.

This argument "puts the cart before the horse by giving the minority a preemptive weapon against the perceived potential infringement of the minority's rights from the majority's attempted resort to the initiative process." Gallivan, 2002 UT 89, ¶61. The Gallivan court further reasoned that putting the majority of Utahns' ability to use the initiative process in the hands of a minority "gives the minority control of the initiative power" and "turns our system of majority rule on its head." Id. This governmental purpose runs counter to the premise that "majority rule is the foundation[] of both of the constitutionally mandated mechanisms for enacting legislation." Id. at ¶60.[14]

Using the Senate District Requirement to avoid initiatives emanating from the Wasatch Front is illegitimate for another reason: it erodes the people's legislative power and enhances the legislative power the people granted to the legislature. "The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share 'equal dignity.'" Id. at ¶23 (citations omitted). Allowing the legislature to make it harder to pass law by initiative than it is to pass law by legislation would permit the legislative branch to "confiscate to itself the bulk of, if not all, legislative power," and render "itself the only legislative game in town." Id. at ¶51.

This argument comes into clearer focus when one takes into account that to make law, the legislature need only secure 15 votes in the Senate and 38 votes in the House. This means that the 11 Senators representing Salt Lake County, together with any four of the ten Senators representing Utah, Davis, and Weber Counties, could pass most legislation. Indeed, to place

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[14] It bears noting that, while not voiced by the legislature, this concern cuts both for and against those living outside the Wasatch Front. With the Senate District Requirement in place, citizens living outside the Wasatch Front cannot place initiatives on the ballot without securing the consent of voters living in Senate Districts located in Salt Lake County.

a *constitutional amendment* before the electorate, only 20 of Utah's 29 Senators (and two-thirds of the members of the House) need to lend their support. This means that the 11 Salt Lake County Senators, joined by nine of the ten Senators from Utah, Davis, and Weber counties, could place a constitutional amendment before the electorate. Thus, it requires broader support, measured in terms of Senate districts, for Utah citizens to place an initiative before the electorate than it does to either (a) pass a law through the legislature or (b) place a *constitutional amendment* before the electorate. The Senate District Requirement dilutes the people's legislative power, reserved unto themselves in the Utah Constitution, to initiate legislation. Diluting the people's legislative power is not a legitimate legislative purpose.

Indeed, this Court emphasized that "[c]ountering the possibility of localized legislation is not a legitimate legislative purpose" and that "[t]he legislature itself does not operate under the requirement that legislation enacted through its processes and procedures must avoid 'localized' legislation that potentially favors one region or county of the state." Gallivan, 2002 UT 89, ¶57. Because the initiative right is "coequal" with the legislature's own power to pass laws, creating barriers to the exercise of the initiative right that do not exist for the legislature cannot be a legitimate legislative purpose. In short, the Public Meetings Requirement and the Senate District Requirement do not further any legitimate legislative purpose.

The Signature Removal Provisions. Examination of the legislative debates does not appear to yield any definitive explanation of the legislature's purposes behind its failure to address the signature removal provisions. To be clear, Safe Havens does not challenge the Legislature's general inclusion of a signature removal provision; indeed, this Court has long ago stated that initiative petition signers have a "fundamental right . . . to withdraw from a petition *at any time before the petition has been acted upon*." See Halgren v. Welling, 63 P.2d

550, 557 (Utah 1936) (emphasis added).

Safe Havens does, however, challenge the ***timing*** of the current signature removal provisions, which allow signers to remove their signatures from petitions up to July 1, when the petitions are submitted to the lieutenant governor. The current scheme, which requires sponsors to submit all signatures to the county clerks no later than June 1 (at which time the signatures, including the signers' names and addresses, become public information), allows initiative opponents at least one month of unfettered access to initiative signers,[15] during which time initiative sponsors are barred from submitting additional replacement signatures.

Because of the timing of the Signature Removal Provisions, sponsors must plan to gather more signatures than are required by the initiative law, so that they can weather the removal process. When coupled with the Senate District Requirement, the Signature Removal Provisions become even more vexing because they allow opponents to target Senate districts with the fewest signatures and pick off enough signers to "de-qualify" that district.

There does not appear to be any valid legislative purpose behind the timing of the Signature Removal Provisions. It would seem to be just as effective, and completely in line with Halgren, to institute a scheme in which signers could remove their names until the petitions begin to be "acted upon" by the county clerks. Safe Havens can only assume that this framework is designed to tilt the playing field in favor of initiative opponents and to make it harder to qualify initiatives for the ballot. The Gallivan Court made clear that this is not a legitimate legislative purpose. Gallivan, 2002 UT 89, ¶51 (the "purpose of ensuring that 'init-

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[15] Enactment of the new One-Year Requirement means that opponents will, in many cases, have much longer than one month to conduct precision removal campaigns. Sponsors will be compelled by the One-Year Requirement to submit signatures well in advance of June 1, giving opponents potentially several months to contact petition signers.

iatives are not so easy to get on the ballot'" "clearly is not a legitimate legislative purpose").

The Same-or-Similar Ban. The Legislature's purpose in enacting the Same-or-Similar Ban was set forth by the bill's sponsor, Sen. Hickman, who bluntly stated as follows:

> *The reason for that was because we, on occasion, have had petitions and initiatives developed on a local level, and fluoridation is a classic example of that, where it just keeps coming back and coming back and coming back.* So, we thought that from the—until there was a change in state policy or attitude by the voters that a four-year period of time was reasonable. The Attorney General has asked us to maybe shorten that, and so we have reduced it to a two-year period.

R. at 223 (emphasis added). Thus, the Legislature's purpose in enacting the two-year ban was to prevent certain initiatives from "coming back and coming back and coming back."

As a practical matter, the initiatives that are continually filed and circulated, year in and year out, are often the ones devoted to issues around which the most robust public debate swirls—term limits, fluoridation, guns in schools, radioactive waste, etc. It hardly needs to be argued that the Legislature's stated purpose—a blatant attempt to impose an outright ban on certain initiatives, which are often the most hotly-debated ones—is not legitimate.

The One-Year Requirement. Examination of the legislative history does not yield any information regarding the legislature's purpose in repealing the provision that, formerly, had allowed sponsors two election cycles to qualify their initiative for the ballot, and shortening the signature collection period to one year. In any event, Defendants will be hard pressed to articulate any legitimate legislative purpose supporting the amendments.

Safe Havens has taxed its creative powers to divine what justifications Defendants could propose to justify these restrictions.[16] The State's inability to justify these new burdens

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[16] It is worthy of note that, before the district court, Defendants did not even attempt to justify any of the challenged provisions (other than the Senate District Requirement) as furthering ***any*** legitimate governmental objective. Specifically, no argument was even (continued...)

will lead inexorably to the conclusion that the legislature put these hurdles in the law solely to make it more difficult to qualify initiatives for the ballot. The Gallivan court has already opined that the legislature has no legitimate interest in making it harder to place initiatives on the ballot. Gallivan, 2002 UT 89, ¶51 (the "purpose of ensuring that 'initiatives are not so easy to get on the ballot'" "clearly is not a legitimate legislative purpose").

Simply stated, with the possible exception of the purpose of promoting an informed electorate, the challenged provisions are not justified by legitimate governmental interests.

b. *Even if legitimate governmental interests existed, the challenged provisions do not actually and substantially further those interests.*

To pass muster under heightened scrutiny, it is not enough that Defendants articulate a legitimate legislative interest. Defendants must also demonstrate that the legislation "has more than a speculative tendency to further the legislative objective, and, in fact, actually and substantially furthers a valid legislative purpose." Gallivan, 2002 UT 89, ¶42.

As noted above, Safe Havens sincerely doubts that Defendants can advance any legitimate goal for any of the challenged provisions. For this reason, they cannot meet their burden of showing that those provisions actually and substantially further any legitimate legislative end. Even assuming, *arguendo*, that promoting statewide geographic support for initiatives, or promoting a better-informed electorate, were legitimate legislative purposes for some of the restrictions, the amendments do not actually further those legislative ends.

The Asserted Purpose of Achieving Statewide Support: The Gallivan Court examined this proposition at length with respect to the multi-county requirement (and, as noted above,

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[16] (...continued)
mounted that the Public Meetings Requirement, the Signature Removal Provisions, the One-Year Requirement, or the Same-or-Similar Ban furthered any legitimate governmental aim.

stated emphatically that countering localized legislation was ***not*** a legitimate governmental purpose, Gallivan, 2002 UT 89, at ¶57). Because the logic Gallivan employed applies with equal force in this context, it bears quoting the entire analysis:

> In addition, the multi-county signature requirement does not actually and substantially further the legislative purpose of ensuring statewide support, that is, broadly distributed geographic support, or of promoting initiatives regarding issues of statewide interest. The multi-county signature requirement has the opposite effect. By giving an effective veto to the rural minority over the urban majority, initiatives that enjoy statewide support from the majority of the population and therefore focus on issues of at least numerical statewide concern are prevented from qualifying for the ballot. In this respect, the multi-county signature requirement thwarts the placement on the ballot of widely supported initiatives. Effectively, only initiatives of rural concern and with rural support get placed on the ballot, thus defeating the use of the initiative process and purpose of statewide support. Therefore, the multi-county signature requirement with regard to this purpose does not pass the Lee test because it does not actually and substantially further the stated legislative purpose of ensuring statewide support.

Gallivan, 2002 UT 89, ¶50. Stated differently, the Gallivan court concluded that the multi-county requirement did not actually and substantially ensure statewide support for initiatives because it had the effect of keeping issues off the ballot that were of a concern to a numerical majority of Utahns statewide. That rationale applies here as well. The Senate District Requirement ensures that an initiative cannot be placed on the ballot unless it appeals to a number of voters outside the Wasatch Front. This means that only those issues that are of concern to those who live outside the Wasatch Front can be placed on the ballot. This decreases the number of issues that can qualify. For this reason, even assuming, *arguendo*, that mustering statewide support were a legitimate governmental purpose, the Senate District Requirement does not substantially further that aim.

The Asserted Purpose of Achieving a Well-Informed Electorate: Defendants may argue that the Public Meetings Requirement (and perhaps the Senate District Requirement as well)

substantially furthers the goal of promoting a well-informed electorate. This Court has rejected this justification. In Gallivan, this Court opined that the circulation of petitions only informs a small number of voters, and that "in reality, it is after the initiative is placed on the ballot and the campaigns for and against the initiative are underway that the electorate becomes informed." Gallivan, 2002 UT 89, ¶62. This Court further found that a geographic requirement is irrelevant to this process "because the electorate becomes informed" once the election commences "whether [or not] the proponents of an initiative circulated the initial petition in and garnered signatures from" the required counties. Id. at ¶63.

An examination of newspaper articles on initiatives that qualify for the ballot bears out the Gallivan Court's reasoning. Before an initiative qualifies for the ballot (that is, during the signature-collecting phase), public debate on the proposed initiative is minimal. However, once an initiative actually qualifies for the ballot, public debate on the issues surrounding the proposed initiative increases dramatically. In 2002, newspaper articles regarding the Radioactive Waste Restrictions Act increased approximately two-fold after the measure qualified for the ballot. See R. at 281-94. The RWRA may have been an anomaly, however, because of a great deal of pre-qualifying publicity regarding the initiative process itself. In 2000, the increase in public debate regarding the "English as the Official Language" initiative subsequent to qualifying for the ballot is even more striking, with public debate appearing to increase by a factor of approximately ten. Id. at ¶¶ 5-6. Public debate, and with it awareness of facts regarding the issues surrounding the initiative, increases greatly after the measure qualifies for the ballot. If the objective is truly to have a better-informed electorate, the best way to further this objective is to allow *more* initiatives to qualify for the ballot, not fewer.

Simply stated, none of the proffered justifications, even if legitimate, are actually and

substantially furthered by the challenged restrictions.

c. *The challenged provisions are not reasonably necessary to further a legitimate goal.*

Finally, the challenged restrictions are not "reasonably necessary to further a legitimate goal," Lee, 867 P.2d at 583, and are not "narrowly tailored to achieve the basic statutory purpose," Wells, 681 P.2d at 206. This is so for two reasons. First, as discussed above, there are no legitimate legislative goals underlying the restrictions. Second, even if there were, the restrictions are not reasonably necessary to promote those goals, because there are other less-restrictive methods that the legislature could employ to achieve these ends.

The legislative history makes it difficult for Defendants to credibly claim that these restrictions were carefully drawn. Time and again during the debates on the amendment, legislators expressed concerns that the restrictions were too burdensome. See R. at 227-28, 231-32, 235, 237, 247-48, 253, 257, 259-60. Time and again the Legislature as a whole ignored these concerns, rejected amendments designed to address these stated concerns, and kept the broad restrictions in place. See R. at 190, 192, 196, 263-64.

Thus, Defendants cannot meet their burden on *any* of the prongs of the heightened scrutiny test, and therefore the challenged provisions are unconstitutional under that test. No matter which test this Court ultimately selects, the challenged provisions must be struck down and excised from the statute books.

C. The Challenged Provisions Violate Article I, Section 15 of the Utah Constitution

The challenged provisions also violate Article I, Section 15 of the Utah Constitution, which guarantees that "[n]o law shall be passed to abridge or restrain the freedom of speech or of the press." There is very little published case law interpreting this section, leading this

Court to conclude that the free speech provision "has never been authoritatively interpreted." KUTV, Inc. v. Conder, 668 P.2d 513, 518 (Utah 1983). Moreover, there is very little history to help mold a proper standard to adjudicate state free speech claims. Id. (stating that "[t]he history of Article I, Section 15 of the Utah Constitution is sparse"). The most substantive guidance from this Court is that the Utah Constitution should afford broader rights than the First Amendment to the U.S. Constitution. Provo City Corp. v. Willden, 768 P.2d 455, 456 n.2 (Utah 1989).[17] In light of the lack of precedent, Safe Havens suggests that this Court apply the same heightened scrutiny framework established in this Court's uniform operation of laws jurisprudence to free speech challenges under the Utah Constitution.

1. The challenged provisions fail under heightened scrutiny and are *therefore unconstitutional.*

As described at length above, when fundamental rights are at issue, heightened scrutiny is appropriate. Because freedom of speech is unquestionably a fundamental right,[18] under the existing uniform operations test the heightened scrutiny analysis would apply automatically to any section 15 challenge. See supra part II.B.3. Applying the heightened scrutiny test to an Article I, section 15 challenge, this Court would first question whether the restrictions on speech are justified because they actually and substantially further a valid legislative purpose.

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[17] As discussed below, the new initiative restrictions do violate the First Amendment to the U.S. Constitution, because they impose *severe* restrictions on core political speech. See infra, Part III. If the restrictions fail under the U.S. Constitution, they must necessarily fail under Article I, section 15 of the Utah Constitution.

[18] See Utah Const., art. I, § 1 (stating that "[a]ll men have the inherent and inalienable right . . . to communicate freely their thoughts and expressions"); Cox v. Hatch, 761 P.2d 556, 558 (Utah 1988) (stating that "[f]reedom of speech is not only the hallmark of free people, but is, indeed, an essential attribute to the sovereignty of citizenship"); Meyer v. Grant, 486 U.S. 414, 420 (1988) (freedom of speech is "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State").

Lee, 867 P.2d at 583. As discussed above, the initiative restrictions will not clear this hurdle.

This Court would next examine whether the requirements are reasonably necessary to further a legitimate legislative purpose. Id. The answer, for the reasons outlined above, is a resounding "No." Accordingly, if this Court decides to apply the fundamental rights analysis to challenges under Article I, section 15, the new restrictions will fail.

2. The challenged provisions fail under the federal free speech test, and are therefore unconstitutional.

If this Court chooses not to apply the fundamental rights/heightened scrutiny framework to Safe Havens' Article I, section 15 challenge, this Court should perhaps apply the federal test, articulated in more detail below. For the reasons stated below, the challenged provisions do not pass muster under the federal test.

For all of these reasons, the challenged portions of Utah's initiative statute are unconstitutional under Article I, section 15 of the Utah Constitution.

III. THE DISTRICT COURT ERRED IN RULING THAT THE CHALLENGED PROVISIONS OF UTAH'S INITIATIVE STATUTE DO NOT VIOLATE THE U.S. CONSTITUTION

In addition to violating the Utah Constitution, the challenged provisions also violate the First and Fourteenth Amendments to the U.S. Constitution, because they burden core political speech and impose severe restrictions upon rights of free speech and political expression.[19]

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[19] The U.S. Constitution applies to this situation, notwithstanding the fact that the U.S. Constitution does not require states to institute any initiative process. A state may choose not to provide its citizens with the right to initiate legislation; the U.S. Supreme Court has made clear, however, that if a state chooses to provide its citizens with an initiative process, that state must do so in a manner consistent with the U.S. Constitution. See Meyer v. Grant, 486 U.S. 414, 420, 424-25 (1988); see also Brady v. Ohman, 1998 U.S. App. LEXIS 16206, *7 (10th Cir. Jul. 15, 1998) (R. at 295).

A. The Challenged Provisions Must Be Subjected to Strict Scrutiny

In 1992, the U.S. Supreme Court stated that

> [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citations omitted). Under this standard, the rigor of the reviewing court's inquiry into a state election law "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." Id. When voters' First and Fourteenth Amendment rights "are subjected to 'severe' restrictions" by a challenged election law, the law is subject to strict scrutiny—"the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" Id. (citations omitted). However, when a state election law imposes only "reasonable, nondiscriminatory restrictions" upon First and Fourteenth Amendment rights, then "'the state's important regulatory interests are generally sufficient to justify' the restrictions." Id. (citations omitted).

Although the "severe restriction" standard set forth in Burdick appears, by its terms, to apply to a challenge to ***any*** state election law, the U.S. Supreme Court has not applied the Burdick framework to challenges to all state election laws. In cases subsequent to Burdick, the Supreme Court has instituted another level of inquiry—before applying the Burdick framework, it first looks to see whether the challenged state law impacts "core political speech," rather than commercial speech or the mere "mechanics of the electoral process." See Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 186 (1999) (applying strict scrutiny, without resort to Burdick, because the challenged law impacted "core political speech"); id. at 207-08 (Thomas, J., concurring) (stating that "[w]hen

a state's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny," but stating that if the law merely regulates "the mechanics of the electoral process," the Burdick framework should be applied); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (stating that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny'"). If the law burdens core political speech, strict scrutiny is applied, without resort to Burdick.

In this case, the challenged provisions of Utah's initiative statute must be subject to strict scrutiny under either analysis. As discussed below, they impact "core political speech," and are therefore subject to strict scrutiny under Buckley, and they impose "severe restrictions" on free speech rights, and are therefore subject to strict scrutiny under Burdick.

1. The challenged provisions burden "core political speech."

Utah's initiative statute must be subjected to strict scrutiny because it impacts "core political speech." In Meyer v. Grant, 486 U.S. 414 (1988), certain citizens challenged a provision of Colorado's initiative statute that made it a crime to pay signature gatherers. The Court first needed to decide which level of scrutiny to apply to the Colorado provision. In reaching its determination, the Court emphasized that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately characterized as 'core political speech.'" Meyer, 486 U.S. at 421-22 (citations omitted). The Court further noted that the provision criminalizing the payment of signature gatherers

> restricts political expression in two ways: First it limits the number of voices who will convey appellees' message and the hours they can speak, and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Id. at 422-23. The Court proceeded to apply "exacting scrutiny" to the provision, noting in

the process that "the burden that Colorado must overcome to justify" its criminalization of the payment of signature gatherers "is well-nigh insurmountable." Id. at 420, 425.

Similarly, in Buckley, the Court again strictly scrutinized certain provisions of Colorado's initiative statute. This time, citizens were challenging Colorado's requirements that signature gatherers be registered to vote in Colorado and wear an identification badge bearing their name; and that initiative sponsors report the names and addresses of all paid signature gatherers and the amount paid to each signature gatherer. The majority of the Court, without even citing to Burdick or using the Burdick analysis, proceeded to apply a form of strict scrutiny because the Colorado initiative statute impacted "core political speech," an area where First Amendment protection is "at its zenith." Buckley, 525 U.S. at 186, 192 & n.12. Justice Thomas, concurring in the judgment, noted that "[w]hen a state's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny," but stating that if the law merely regulates "the mechanics of the electoral process," the Burdick framework should be applied. Id. at 207-08. Ultimately, the Court applied a form of strict scrutiny to Colorado's initiative law, because it burdened core political speech.

Like the Colorado initiative restrictions at issue in Meyer and Buckley, the restrictions imposed by Utah's initiative statute also burden core political speech and must therefore be subjected to strict scrutiny. As noted above, Safe Havens challenges, under the Utah Constitution, five different restrictions placed on the initiative right by Utah's new statute: (1) the Senate District Requirement; (2) the Signature Removal Provisions; (3) the Public Meetings Requirement; (4) the Same-or-Similar Ban; and (5) the One-Year Requirement. Safe Havens also brings a federal constitutional challenge to the first four (but not the fifth) of these

provisions.[20] These four provisions, both individually and collectively, burden the circulation of initiative petitions, an activity which has been held to be "core political speech." See Meyer, 486 U.S. at 421-22, and the individual burdens imposed upon core political speech by each of the challenged provisions of the Utah initiative statute are greater than the burdens imposed by the Colorado regulations struck down in Meyer and Buckley.

The Same-or-Similar Ban. The Same-or-Similar Ban severely restricts initiative-related speech and expression. This provision takes certain subjects, typically among the more hotly-debated subjects in the state, and imposes a flat ban on those subjects for two years, cutting sponsors off before they even are able to begin speaking. It is difficult to imagine a more severe restriction on speech, one that is compounded by its content-based nature.

In addition, the ban could amount to more than a two-year ban, if initiative opponents take advantage of this provision by filing sham initiatives, expending only token effort to gather a few signatures, designed to keep similar initiatives off of the ballot in future elections. The ban directly impacts the free speech rights of initiative sponsors, and clearly makes it less likely that sponsors will qualify an initiative for the ballot. Meyer, 486 U.S. at 423.

The Public Meetings Requirement. The Public Meetings Requirement imposes severe restrictions upon initiative-related speech and expression in Utah. As detailed at length above, this requirement substantially increases the costs of qualifying an initiative for the ballot. The increased costs will undoubtedly cause persons to abandon plans to bring initiatives which will

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[20] Safe Havens does not bring a federal challenge to the One-Year Requirement. The Tenth Circuit has previously upheld a six-month time limit. See American Const. Law Foundation v. Meyer, 120 F.3d 1092, 1098-99 (10th Cir. 1997) (holding a six-month signature gathering time limit constitutionally permissible). The ACLF case was taken to the U.S. Supreme Court, where it was re-captioned Buckley v. ACLF, but the Tenth Circuit's decision to uphold the signature-gathering time limit was not directly at issue in Buckley. Safe Havens has therefore opted to challenge this provision only under the Utah Constitution.

chill the quantum of speech on core political issues. Meyer, 486 U.S. at 423.

The Senate District Requirement. The Senate District Requirement imposes a severe burden on the core political speech and expression associated with the rights of Utahns to initiate legislation. As discussed above, to pass a statute through the Utah Senate, proponents need secure the votes of only 15 Senators—indeed, placing a constitutional amendment before the electorate requires the votes of only 20 Senators. Yet, to place an initiative before the electorate, sponsors must reach a 10% threshold in 26 Senate districts.

This requirement clearly burdens speech, not only because it requires sponsors to speak in areas of the state where they may not otherwise have chosen to speak, but also because it "makes it less likely that [sponsors] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Meyer, 486 U.S. at 423. Indeed, as discussed above, initiatives only become the focus of true statewide discussion *after* they qualify for the ballot, not before. Gallivan, 2002 UT 89, ¶63; R. at 281-94. Requiring initiative proponents to meet standards higher than those required of proponents of constitutional amendments is clearly a severe restriction, and one that chills speech by deterring Utah citizens from attempting to initiate legislation. R. at 121.

The Signature Removal Provisions. The burdens imposed by the Senate District Requirement are magnified when that requirement is viewed in conjunction with the Signature Removal Provisions. As discussed above, those provisions (along with the Senate District Requirement) allow initiative opponents to focus on one or two (or at most, four) Senate districts, and, by persuading several hundred strategically-placed signers to remove their names from the petition, initiative opponents can, in one month and with far fewer resources, undo all of the sponsors' hard work and tens of thousands of signatures. In effect, the

legislature has created a one-month period in which initiative opponents are allowed unfettered free speech, but in which initiative sponsors' free speech is restricted. These provisions also make it less likely that an initiative will qualify for the ballot, and thus severely restrict initiative-related speech and expression in Utah. Meyer, 486 U.S. at 423.

Each of these provisions imposes severe restrictions upon Utahns' initiative-related speech and expression. However, collectively, these provisions impose an incredible burden on the initiative process, and have the effect of discouraging all but the most well-heeled interest groups from mounting an initiative campaign. In short, because Utah's new restrictions directly burden core political speech, they must be subjected to strict scrutiny.

2. The challenged provisions impose "severe restrictions" on Utahns' First and Fourteenth Amendment rights.

Moreover, even if the Burdick framework were to apply here, strict scrutiny would still be the result. As Justice Thomas noted, "restrictions on core political speech [] plainly impose a 'severe burden.'" See Buckley, 525 U.S. at 208. This fact alone, as discussed above, compels strict scrutiny. Moreover, the burdens imposed by Utah's new initiative statute are incredibly severe, a fact made plain by comparison to the relatively benign provisions of the Colorado initiative statute struck down in Buckley.

In that case, the restrictions which the U.S. Supreme Court held burdened "core political speech" were restrictions requiring signature gatherers (a) to be registered to vote in Colorado, (b) to wear name badges, and (c) to report their income from signature gathering. These restrictions, while certainly annoying, did not impose a burden of the same magnitude as that imposed by the Utah restrictions. The Colorado restrictions directly at issue in Buckley contained no outright ban on certain initiatives, and did not concern the actual requirements for qualifying an initiative for the ballot. The Colorado restrictions imposed only an indirect

burden, as opposed to a direct burden, on initiative sponsors' ability to qualify an initiative for the ballot. Still, the Court intimated that the Colorado regulations imposed a "severe" burden on speech. See Buckley, 525 U.S. at 192 & n.12; id. at 206 (Thomas, J., concurring).

Thus, even under a Burdick-style analysis, Utah's initiative statute must be subjected to strict scrutiny. Accordingly, whether or not the Burdick framework is applied, this Court must apply strict scrutiny to the challenged provisions of Utah's initiative statute.

B. The Challenged Provisions Cannot Pass Muster Under Strict Scrutiny

To pass muster under strict constitutional scrutiny, the challenged statutory provision must be "narrowly tailored to serve a compelling state interest." See Buckley, 525 U.S. at 192 & n.12; id. at 207 (Thomas, J., concurring); Burdick, 504 U.S. at 434.

As discussed above, supra Part II.B, the challenged provisions do not serve any state interest that rises to the level of "compelling." And, even assuming such an interest existed, the statute is not narrowly tailored to serve those interests, because there are other, less burdensome ways to further the asserted interests of the legislature.

IV. SEVERABILITY—THE OFFENDING PORTIONS OF THE STATUTE ARE SEVERABLE FROM THE REMAINDER

Because portions of Utah's initiative statute are unconstitutional and must be struck down, the final question surrounds severability, and whether the offending portions of the statute are severable from the remainder. For the reasons set forth below, the offending portions of the statute are in fact severable from the remainder, because an operable statute remains in place under which initiatives may be qualified for the ballot.

A. General Severability Principles—The Presumption of Severability

Any analysis of the severability question must begin with the "general rule" that "'statutes, where possible, are to be construed so as to sustain their constitutionality.

Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done.'" See State v. Lopes, 1999 UT 24, ¶18, 980 P.2d 191 (citations omitted). Thus, there is a presumption that the unconstitutional portion of the statute can be severed without affecting the remainder.

This presumption can, of course, be overcome with a showing that the legislature intended that the unconstitutional portion of the statute not be severable from the remainder. See, e.g., Stewart v. Utah Public Serv. Comm'n, 885 P.2d 759, 779 (Utah 1994) (stating that severability "is primarily a matter of legislative intent"). In some cases (like this one), the legislature places a severability provision into the statute, explicitly setting forth its intent regarding severability. If such a provision exists, then legislative intent is plain. More often, however, the legislature does not expressly set forth its intent regarding the severability of statutory provisions. In such cases, courts must "turn to the statute itself, and examine the remaining constitutional portion of the statute in relation to the stricken portion. If the remainder of the statute is operable and still furthers the intended legislative purpose, the statute will be allowed to stand." Lopes, 1999 UT 24, ¶19, 980 P.2d 191.

B. Legislative Intent

The Utah legislature included in S.B. 28 a severability provision, but one which is extremely narrow. That provision reads in its entirety as follows:

> (1) Except as provided in subsection (2), it is the intent of the Legislature that if any provision of this act, or the application of any provision of this act to any person or circumstance, is held invalid, the remainder of this act shall be given effect without the invalid provision or application.
>
> (2) It is the intent of the Legislature that:
>
> (a) Subsection 20A-7-201(1)(a)(ii) [requiring sponsors of an initiative to be submitted to the Legislature, rather than to the people, to reach a 5% threshold in 26 of 29 Utah

Senate districts] is not severable from Subsection 20A-7-201(1)(a)(i) [the general statewide 5% threshold]; and

(b) Subsection 20A-7-201(2)(a)(ii) [requiring sponsors of an initiative to be submitted to the people to reach a 10% threshold in 26 of 29 Utah Senate districts] is not severable from Subsection 20A-7-201(2)(a)(i) [the general statewide 10% threshold].

See R. at 220. Thus, it is clear, from Subsection (1), that the legislature intended that (a) the Public Meetings Requirement, (b) the Signature Removal Provisions, (c) the Same-or-Similar Ban, and (d) the One-Year Requirement all be severable from the remainder of the statute.

Regarding the Senate District Requirement, however, the legislature is of a different (and very specific) mind, as set forth in Subsection (2). It has stated that the Senate District Requirement is not severable from the general statewide 10% threshold, meaning that if the Senate District Requirement is struck down, the general 10% statewide threshold falls as well. However, the severability provision is extremely narrow, and specifically ***does not*** state that, if the Senate District Requirement falls, the entire statute must also fall. The Senate District Requirement is specifically not severable ***only from the general 10% threshold***.

C. The Result of the Severability Provision

The result of the very specific and narrow severability provision is that, if all five of the provisions which Safe Havens challenges are struck down, the following statutory scheme will be in place: sponsors may qualify an initiative for the ballot without obtaining any signatures and without holding any public meetings. Sponsors will be required only to submit an application to the lieutenant governor, who will review the application for constitutionality and absurdity (but will not be able to reject applications based on the same-or-similar requirement) and approve or reject it. Because no signature requirement exists, but the rest of the statute is expressly intact under the legislature's severability provision, the county clerks must still

check each signature for accuracy and pass them along to the lieutenant governor, who then must mark "sufficient" all initiative packets, no matter how many signatures the sponsors have gathered. While this result may seem strange, it is in fact compelled by the plain language of the legislature's own severability provision.

This statutory scheme, while certainly different from past initiative statutes, is certainly "operable" and certainly furthers the purpose of facilitating the right of Utah citizens to initiate legislation. See Lopes, 1999 UT 24, ¶19, 980 P.2d 191 (stating that "[i]f the remainder of the statute is operable and still furthers the intended legislative purpose, the statute will be allowed to stand"). Thus, if this Court agrees with Safe Havens that the challenged portions of the statute are unconstitutional, then Safe Havens is entitled to a declaration that it will be able to qualify its initiative for the ballot without complying with a specific signature requirement.

CONCLUSION

For all of the foregoing reasons, it is Safe Havens (and not Defendants) who are entitled to summary judgment. This Court should declare that either (a) the new provisions of S.B. 28 do not apply to Safe Havens, or (b) the challenged provisions are unconstitutional. Accordingly, the Order and Judgment of the district court should be reversed, and this case should be remanded to the district court with instructions to grant Safe Havens' Motion for Summary Judgment.

DATED this 15th day of August, 2003.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
John A. Pearce
Ryan M. Harris

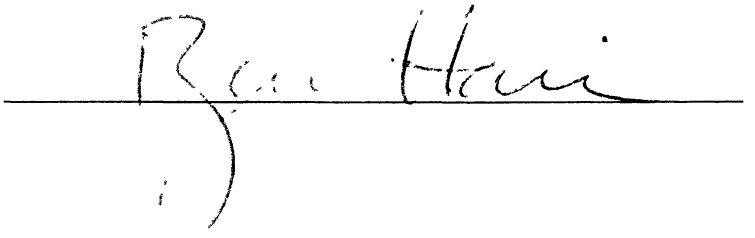
Lisa Watts Baskin

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2003, I caused to be sent, via hand-delivery, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following:

Thom D. Roberts
Assistant Attorney General
UTAH ATTORNEY GENERAL'S OFFICE
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857



ADDENDUM

Tab A

20A-7-103. Constitutional amendments and other questions — Procedures for submission to popular vote.

(1) The procedures contained in this section govern when:

(a) the Legislature submits a proposed constitutional amendment or other question to the voters; and

(b) an act of the Legislature is referred to the voters by referendum petition.

(2) In addition to the publication in the voter information pamphlet required by Section 20A-7-702, the lieutenant governor shall, not more than 60 days or less than ten days before the regular general election, publish the full text of the amendment, question, or statute in at least one newspaper in every county of the state where a newspaper is published.

(3) The legislative general counsel shall:

(a) entitle each proposed constitutional amendment "Constitutional Amendment Number _____" and give it a number;

(b) entitle each proposed question "State Proposition Number _____" and give it a number;

(c) entitle each state referendum that has qualified for the ballot "Citizen's State Referendum Number _____" and give it a number;

(d) draft and designate a ballot title that summarizes the subject matter of the amendment or question; and

(e) deliver them to the lieutenant governor.

(4) The lieutenant governor shall certify the number and ballot title of each amendment or question to the county clerk of each county no later than the second Friday after the primary election.

(5) The county clerk of each county shall:

(a) ensure that both the number and title of the amendment, question, or referendum is printed on the sample ballots and official ballots; and

(b) publish them as provided by law.

History: C. 1953, 20A-7-103, enacted by L. 1995, ch. 340, § 20; 2001, ch. 57, § 4; 2002, ch. 127, § 1.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, substituted Subsections (3)(a), (3)(b), and (3)(c) for former Subsection (3)(a) which read "designate the amendment or question by number and order of presentation on the ballot" and changed the subsection designations

The 2002 amendment, effective May 6, 2002, in Subsection (2) added the phrase at the beginning ending with "Section 20A-7-702" and substituted "not more than 60 days or less than ten days" for "not later than 60 days "

PART 2

STATEWIDE INITIATIVES

20A-7-201. Statewide initiatives — Signature requirements — Submission to the Legislature or to a vote of the people.

(1) (a) A person seeking to have an initiative submitted to the Legislature for approval or rejection shall obtain:

(i) legal signatures equal to 5% of the cumulative total of all votes cast for all candidates for governor at the last regular general election at which a governor was elected; and

(ii) from each of at least 26 Utah State Senate districts, legal signatures equal to 5% of the total of all votes cast in that district for all candidates for governor at the last regular general election at which a governor was elected

(b) If, at any time not less than ten days before the beginning of an annual general session of the Legislature, the lieutenant governor declares sufficient any initiative petition that is signed by enough voters to meet the requirements of this Subsection (1), the lieutenant governor shall deliver a copy of the petition and the cover sheet required by Subsection (1)(c) to the president of the Senate, the speaker of the House, and the director of the Office of Legislative Research and General Counsel

(c) In delivering a copy of the petition, the lieutenant governor shall include a cover sheet that contains

(i) the cumulative total of all votes cast for all candidates for governor at the last regular general election at which a governor was elected,

(ii) the total of all votes cast in each Utah State Senate district for all candidates for governor at the last regular general election at which a governor was elected,

(iii) the total number of certified signatures received for the submitted initiative, and

(iv) the total number of certified signatures received from each Utah State Senate district for the submitted initiative

(2) (a) A person seeking to have an initiative submitted to a vote of the people for approval or rejection shall obtain

(i) legal signatures equal to 10% of the cumulative total of all votes cast for all candidates for governor at the last regular general election at which a governor was elected, and

(ii) from each of at least 26 Utah State Senate districts, legal signatures equal to 10% of the total of all votes cast in that district for all candidates for governor at the last regular general election at which a governor was elected

(b) If, at any time not less than four months before any regular general election, the lieutenant governor declares sufficient any initiative petition that is signed by enough legal voters to meet the requirements of this subsection, the lieutenant governor shall submit the proposed law to a vote of the people at the next regular general election

(3) The lieutenant governor shall provide the following information from the official canvass of the last regular general election at which a governor was elected to any interested person

(a) the cumulative total of all votes cast for all candidates for governor, and

(b) for each Utah State Senate district, the total of all votes cast in that district for all candidates for governor

History: C. 1953, 20A-7-201, enacted by L. 1994, ch. 1, § 11; 1995, ch. 152, § 8; 1998, ch. 136, § 1; 1999, ch. 115, § 1; 2003, ch. 304, § 1.

Amendment Notes. — The 1999 amendment, effective May 3 1999, rewrote Subsection (1)(b) and added Subsection (1)(c)

The 2003 amendment, effective May 5, 2003, substituted "26 Utah State Senate districts" for "20 counties" in Subsections (1)(a)(ii) and (2)(a)(ii), substituted "Utah State Senate district" for 'county" in Subsections (1)(c)(ii), (1)(c)(iv), and (3)(b), and substituted "district" for "county" in Subsections (1)(a)(ii), (2)(a)(ii), and (3)(b)

Severability Clauses. — Laws 2003 ch 304 § 9 provides that Subsection (1)(a)(ii) is not severable from Subsection (1)(a)(i) and Subsection (2)(a)(ii) is not severable from Subsection (2)(a)(i)

NOTES TO DECISIONS

Analysis

Constitutionality
Severability

Constitutionality.

The multi county signature requirement of Subsection (2)(a)(ii) (before the 2003 amendment substituted Senate districts for counties) violated the uniform operation of laws provision of the Utah Constitution, Art I § 24, and the Equal Protection Clause of the 14th Amendment to the U S Constitution Gallivan v Walker, 2002 UT 89, 54 P3d 1069

Severability.

Unconstitutional multi-county signature requirement of Subsection (2)(a)(ii) (before the 2003 amendment substituted Senate districts for counties and added a nonseverability provi sion) was severable from the rest of the initiative enabling statute Gallivan v Walker, 2002 UT 89, 54 P3d 1069

20A-7-202. Statewide initiative process — Application procedures — Time to gather signatures — Grounds for rejection.

(1) Persons wishing to circulate an initiative petition shall file an application with the lieutenant governor

(2) The application shall contain

(a) the name and residence address of at least five sponsors of the initiative petition,

(b) a statement indicating that each of the sponsors

(i) is a resident of Utah, and

(ii) has voted in a regular general election in Utah within the last three years,

(c) the signature of each of the sponsors, attested to by a notary public,

(d) a copy of the proposed law, and

(e) a statement indicating whether or not persons gathering signatures for the petition may be paid for doing so

(3) The application and its contents are public when filed with the lieutenant governor

(4) (a) The sponsors shall qualify the petition for the regular general election ballot no later than one year after the application is filed

(b) If the sponsors fail to qualify the petition for that ballot, the sponsors must

(i) submit a new application,

(ii) obtain new signature sheets, and

(iii) collect signatures again

(5) The lieutenant governor shall reject the application and not issue circulation sheets if

(a) the law proposed by the initiative is patently unconstitutional,

(b) the law proposed by the initiative is nonsensical,

(c) the proposed law could not become law if passed, or

(d) the law proposed by the initiative is identical or substantially similar to a law proposed by an initiative that was submitted to the county clerks and lieutenant governor for certification and evaluation within two years preceding the date on which the application for this initiative was filed.

History: C. 1953, 20A-7-202, enacted by L. 1994, ch. 1, § 12; 1995, ch. 153, § 1; 1999, ch. 45, § 9; 2003, ch. 304, § 2.

Amendment Notes — The 1999 amendment effective March 15 1999 substituted "resident of Utah for 'registered voter' in Subsection (2)(b)(i)

The 2003 amendment effective May 5 2003 added Subsection (2)(e) substituted 'one year' for 'the second regular general election' in

Subsection (4)(a), added Subsection (5)(d), and made related changes

Severability Clauses. — Laws 2003, ch 304, § 9 makes the amendments to this section, if held invalid, severable from the remainder of the act, which also amended §§ 20A-7-201, 20A-7-203, 20A-7-207, 20A-7-213, 20A-11-702, and 20A-11-802 and enacted § 20A-7-204.1

20A-7-203. Form of initiative petition and signature sheets.

(1) (a) Each proposed initiative petition shall be printed in substantially the following form:

"INITIATIVE PETITION To the Honorable _____, Lieutenant Governor:

We, the undersigned citizens of Utah, respectfully demand that the following proposed law be submitted to the legal voters/Legislature of Utah for their/its approval or rejection at the regular general election/session to be held/beginning on _____ (month/day/year);

Each signer says:

I have personally signed this petition;

I am registered to vote in Utah or intend to become registered to vote in Utah before the certification of the petition names by the county clerk; and

My residence and post office address are written correctly after my name.

NOTICE TO SIGNERS:

Public hearings to discuss this petition were held at: (list dates and locations of public hearings.)"

(b) The sponsors of an initiative shall attach a copy of the proposed law to each initiative petition.

(2) Each signature sheet shall:

(a) be printed on sheets of paper 8-½ inches long and 11 inches wide;

(b) be ruled with a horizontal line ¾ inch from the top, with the space above that line blank for the purpose of binding;

(c) contain the title of the initiative printed below the horizontal line;

(d) contain the word "Warning" printed or typed at the top of each signature sheet under the title of the initiative;

(e) contain, to the right of the word "Warning," the following statement printed or typed in not less than eight-point, single leaded type:

"It is a class A misdemeanor for anyone to sign any initiative petition with any other name than his own, or knowingly to sign his name more than once for the same measure, or to sign an initiative petition when he knows he is not a registered voter and knows that he does not intend to become registered to vote before the certification of the petition names by the county clerk."; and

(f) be vertically divided into columns as follows:

(i) the first column shall appear at the extreme left of the sheet, be ⅝ inch wide, be headed with "For Office Use Only," and be subdivided with a light vertical line down the middle with the left subdivision entitled "Registered" and the right subdivision left untitled;

(ii) the next column shall be three inches wide, headed "Registered Voter's Printed Name (must be legible to be counted)";

(iii) the next column shall be three inches wide, headed "Signature of Registered Voter"; and

(iv) the final column shall be 4-⅜ inches wide, headed "Street Address, City, Zip Code".

(3) The final page of each initiative packet shall contain the following printed or typed statement:

"Verification

State of Utah, County of _____

I, _____, of _____, hereby state that:

I am a resident of Utah and am at least 18 years old;

All the names that appear in this packet were signed by persons who professed to be the persons whose names appear in it, and each of them signed his name on it in my presence;

I believe that each has printed and signed his name and written his post office address and residence correctly, and that each signer is registered to vote in Utah or intends to become registered to vote before the certification of the petition names by the county clerk.

I have not paid or given anything of value to any person who signed this petition to encourage them to sign it. _____

_____

(Name) (Residence Address) (Date)"

(4) The forms prescribed in this section are not mandatory, and, if substantially followed, the initiative petitions are sufficient, notwithstanding clerical and merely technical errors.

History: C. 1953, 20A-7-203, enacted by L. 1994, ch. 1, § 13; 1995, ch. 153, § 2; 1999, ch. 45, § 10; 2000, ch. 3, § 5; 2000, ch. 75, § 11; 2003, ch. 304, § 3.

Amendment Notes. — The 1999 amendment, effective March 15, 1999, substituted "a resident of Utah" for "registered to vote in Utah" in the fourth line of the form in Subsection (3)

The 2000 amendment by ch 3, effective May 1, 2000, updated the date line in Subsection (1)(a) and added the age requirement "at least 18 years old" to Subsection (3)

The 2000 amendment by ch 75, effective May 1, 2000, updated the date line in Subsection (1)(a)

The 2003 amendment, effective May 5, 2003, added the requirement to list public hearings in Subsection (1)(a), deleted former Subsection (2)(f) concerning ruled lines under the Warning statement, added the last sentence in Subsection (3), and made related changes

Severability Clauses. — Laws 2003, ch 304, § 9 makes the amendments to this section, if held invalid, severable from the remainder of the act, which also amended §§ 20A-7-201, 20A-7-202, 20A-7-207, 20A-7-213, 20A-11-702, and 20A-11-802 and enacted § 20A-7-204 1

20A-7-204.1. Public hearings to be held before initiative petitions are circulated.

(1) (a) Before circulating initiative petitions for signature statewide, sponsors of the initiative petition shall hold at least seven public hearings throughout Utah as follows:

(i) one in the Bear River region — Box Elder, Cache, or Rich County;

(ii) one in the Southwest region — Beaver, Garfield, Iron, Kane, or Washington County;

(iii) one in the Mountain region — Summit, Utah, or Wasatch County;

(iv) one in the Central region — Juab, Millard, Piute, Sanpete, Sevier, or Wayne County,

(v) one in the Southeast region — Carbon, Emery, Grand, or San Juan County;

(vi) one in the Uintah Basin region — Daggett, Duchesne, or Uintah County; and

(vii) one in the Wasatch Front region — Davis, Morgan, Salt Lake, Tooele, or Weber County.

(b) Of the seven meetings, at least two of the meetings must be held in a first or second class county, but not in the same county

(2) At least three calendar days before the date of the public hearing, the sponsors shall

(a) provide written notice of the public hearing to

(i) the lieutenant governor for posting on the state's website, and

(ii) each state senator, state representative, and county commission or county council member who is elected in whole or in part from the region where the public hearing will be held, and

(b) publish written notice of the public hearing detailing its time, date, and location in at least one newspaper of general circulation in each county in the region where the public hearing will be held

(3) (a) During the public hearing, the sponsors shall either

(i) video tape or audio tape the public hearing and, when the hearing is complete, deposit the complete audio or video tape of the meeting with the lieutenant governor, or

(ii) take comprehensive minutes of the public hearing, detailing the names and titles of each speaker and summarizing each speaker's comments

(b) The lieutenant governor shall make copies of the tapes or minutes available to the public

History C 1953, 20A-7-204 1, enacted by L 2003, ch 304, § 4.

Severability Clauses — Laws 2003 ch 304 § 9 makes this section if held invalid severable from the remainder of the act which also amended §§ 20A 7 201 to 20A 7 203 20A 7 207 20A 7 213 20A 11 702 and 20A 11 802

Effective Dates — Laws 2003 ch 304 became effective on May 5 2003, pursuant to Utah Const Art VI Sec 25

20A-7-205. Obtaining signatures — Verification — Removal of signature.

(1) Any Utah voter may sign an initiative petition if the voter is a legal voter

(2) The sponsors shall ensure that the person in whose presence each signature sheet was signed

(a) is at least 18 years old and meets the residency requirements of Section 20A-2-105, and

(b) verifies each signature sheet by completing the verification printed on the last page of each initiative packet

(3) (a) (i) Any voter who has signed an initiative petition may have his signature removed from the petition by submitting a notarized statement to that effect to the county clerk

(ii) In order for the signature to be removed, the statement must be received by the county clerk before he delivers the petition to the lieutenant governor

(b) Upon receipt of the statement, the county clerk shall remove the signature of the person submitting the statement from the initiative petition

(c) No one may remove signatures from an initiative petition after the petition is submitted to the lieutenant governor

History C 1953, 20A-7 205, enacted by L. 1994, ch. 1, § 15; 1995, ch 153, § 4, 1995, ch. 165, § 1, 1999, ch. 45, § 11, 2000, ch. 3, § 6.

Amendment Notes. — The 1999 amendment effective March 15 1999 deleted former Subsection (2)(a) which read is registered to vote in Utah redesignating existing Subsections (2)(b) and (2)(c) as (2)(a) and (2)(b)

The 2000 amendment, effective May 1 2000, added the age requirement at least 18 years old to Subsection (2)(a)

ARTICLE V

DISTRIBUTION OF POWERS

Section 1. [Three departments of government.]

NOTES TO DECISIONS

ANALYSIS

Applicability.

This section does not limit the authority of the Utah Department of Transportation (UDOT), as an administrative body, to make rules because, although administrative bodies are nominally designated a part of the executive branch, they do not fall within the constitutional definition of the Executive Department, therefore, the prohibition of Art V, Sec I does not apply Robinson v State, 2001 UT 21, 20 P3d 396

Crimes and criminal procedure.

—Parole.

The Board of Pardons' exercise of its parole power in setting determinate parole dates does not violate the separation of powers doctrine Padilla v Utah Bd of Pardons & Parole, 947 P2d 664 (Utah 1997)

Judicial infringement.

Allowing a court to select a particular prosecutor to appear and prosecute a criminal case appears to be an impermissible infringement upon the executive branch's duty and right to direct the prosecution Salt Lake City v Dorman-Ligh, 912 P2d 452 (Utah Ct App 1996)

Section 59-1-601, which purports to grant the district court jurisdiction to review by trial de novo final decisions of the state tax commission resulting from formal hearings, is unconstitutional under Utah Const , Art XIII, Sec 11 and this section Evans & Sutherland Computer Corp v Utah State Tax Comm'n, 953 P2d 435 (Utah 1997)

Legislative infringement.

Section 78 51-25, prohibiting the unauthorized practice of law, did not encroach on the exclusive jurisdiction of the Supreme Court to regulate the practice of law as granted by Utah Const , Art VIII, § 4 Board of Comm'rs of State Bar v Petersen, 937 P2d 1263 (Utah 1997)

COLLATERAL REFERENCES

Utah Law Review. — Case Law Development Constitutional Law — Code Provisions Providing for Legislative Appointments to Judicial Conduct Commission Held Constitutional, 1998 Utah L Rev 596

Recent Developments in Utah Law — Administrative Law, 2001 Utah L Rev 1019

ARTICLE VI

LEGISLATIVE DEPARTMENT

Section 1. [Power vested in Senate, House and People.]

(1) The Legislative power of the State shall be vested in

(a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah, and

(b) the people of the State of Utah as provided in Subsection (2).

(2) (a) (i) The legal voters of the State of Utah in the numbers, under the conditions, in the manner, and within the time provided by statute, may:

(A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute; or

(B) require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be submitted to the voters of the State, as provided by statute, before the law may take effect

(ii) Notwithstanding Subsection (2)(a)(i)(A), legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.

(b) The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:

(i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or

(ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.

History: Const. 1896; Nov. 6, 1900; 1998, S.J.R. 10, § 1; 1999, S.J.R. 5, § 3.

Amendment Notes. — Laws 1998, S J R 10, § 1 proposed amending this section to add the second sentence of the second paragraph in Subsection 2 The proposed amendment was approved by the voters of the state at the 1998 general election and took effect on January 1, 1999

Laws 1999, S J R 5, § 3 proposed amending this section The amendment subdivided the section, added "Notwithstanding Subsection (2)(a)(i)(A)" in Subsection (2)(a)(ii), in Subsection (2) substituted "adoption upon a majority vote" for "a vote of the people for approval or rejection" twice, "statute" for "law" twice, "in the numbers" for "such fractional part thereof" twice, and "county, city, or town" for "legal subdivision" or "legal subdivision of the State" in three places, and made numerous stylistic changes throughout the section The amendment was approved by the electors of the state and took effect on January 1, 2001

NOTES TO DECISIONS

ANALYSIS

Administrative bodies
Initiative and referendum
Cited

Administrative bodies.

Although Utah Const , Art VI, Sec 1 does restrict the ability of the legislature to delegate legislative functions to administrative agencies, the legislature specifically granted the Utah Department of Transportation the power to enact administrative rules in the language of § 72 1-201 Robinson v State, 2001 UT 21, 20 P3d 396

Initiative and referendum.

The provision of § 20A-7-501 for submission of an initiative to voters of a city at the next municipal general election is not an unreasonable restraint on the rights of the electorate by the legislature in limiting the opportunity for city-wide initiatives to two-year intervals Owens v Hunt, 882 P2d 660 (Utah 1994)

Cited in Biglei v Vernon, 858 P2d 1391 (Utah 1993), A B v State, 936 P2d 1091 (Utah Ct App 1997), cert granted, 945 P2d 1118 (Utah 1997), Gallivan v Walker, 2002 UT 89, 54 P3d 1069, Low v City of Monticello, 2002 UT 90 54 P3d 1153

project did not unconstitutionally grant benefits to private individuals, any benefits were strictly incidental to the public purpose of termination of urban blight Tribe v Salt Lake City Corp , 540 P 2d 499 (Utah 1975)

COLLATERAL REFERENCES

Am. Jur. 2d. — 36 Am Jur 2d Franchises §§ 9 to 23

C.J.S. — 37 C J S Franchises § 26
Key Numbers. — Franchises ⇐ 11

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

History: Const. 1896.
Cross-References. — Prohibition on private or special laws, Utah Const , Art VI, Sec 26

NOTES TO DECISIONS

ANALYSIS

In general.

All laws shall operate uniformly wherever uniform laws can be enacted State v Holtgreve, 58 Utah 563, 200 P 894, 26 A L R 696 (1921)

Objects and purposes of law present touchstone for determining proper and improper classifications State v Mason, 94 Utah 501, 78 P 2d 920, 117 A L R 330 (1938), State v J B & R E Walker, Inc , 100 Utah 523, 116 P 2d 766 (1941)

One who assails legislative classification as arbitrary has burden of proving it to be such State v J B & R E Walker, Inc , 100 Utah 523, 116 P 2d 766 (1941)

Classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for differentiation between classes or subject matters included, as compared to those excluded, provided differentiation bears reasonable relation to purposes of act State v J B & R E Walker, Inc , 100 Utah 523, 116 P 2d 766 (1941)

Before legislative enactment can be interfered with, court must be able to say that there is no fair reason for the law that would not require equally its extension to those which it leaves untouched State v J B & R E Walker, Inc , 100 Utah 523, 116 P 2d 766 (1941)

Only where some persons or transactions excluded from operation of law are, as to the subject matter of the law, in no differentiable class from those included in its operation, is the law discriminatory in the sense of being arbitrary and unconstitutional, and if reasonable basis to differentiate can be found, law must be held constitutional State v J B & R E Walker, Inc , 100 Utah 523, 116 P 2d 766 (1941)

Inability of legislature to make perfect classification does not render statute unconstitutional State v J B & R E Walker, Inc , 100 Utah 523, 116 P 2d 766 (1941)

In determining whether classification made by legislature is unconstitutional discrimination is very essence of classification and is not objectionable unless founded upon unreasonable distinctions Gronlund v Salt Lake City, 113 Utah 284 194 P 2d 464 (1948)

An act is never unconstitutional because of

P.2d 1302 (Utah), cert. denied, 464 U.S. 894, 104 S. Ct. 241, 78 L. Ed. 2d 231 (1983).

Cited in State v. Droneburg, 781 P.2d 1301 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Constitutional Law, 1987 Utah L. Rev. 82.

Note, *State v. Nielsen*: Immaterial False Statements in Search Warrant Affidavits, 1987 Utah L. Rev. 753.

Recent Developments in Utah Law — Legislative Enactments — Labor Law, 1988 Utah L. Rev. 284.

Recent Developments in Utah Law — Judicial Decisions — Criminal Procedure, 1989 Utah L. Rev. 223.

Brigham Young Law Review. — An Analytical Model to Assure Consideration of Parental and Familial Interests When Defining the Constitutional Rights of Minors — An Examination of *In re Scott K.*, 1980 B.Y.U. L. Rev. 598.

Journal of Contemporary Law. — Note discussing "open fields" doctrine, 11 J. Contemp. L. 531 (1985).

Am. Jur. 2d. — 68 Am. Jur. 2d Searches and Seizures § 6 et seq.

C.J.S. — 79 C.J.S. Searches and Seizures § 3 et seq.

A.L.R. — Admissibility, in civil case, of evidence obtained by unlawful search and seizure, 5 A.L.R.3d 670.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 A.L.R.3d 473.

Validity of consent to search given one in custody of officers, 9 A.L.R.3d 858.

Traffic violation: lawfulness of search of motor vehicle following arrest for traffic violation, 10 A.L.R.3d 314.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 A.L.R.3d 359.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

Sufficiency of description, in search warrant, of apartment or room to be searched in multiple-occupancy structure, 11 A.L.R.3d 1330.

Modern status of rule as to validity of nonconsentual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search, 19 A.L.R.3d 727.

Plea of guilty as waiver of claim of unlawful search and seizure, 20 A.L.R.3d 724.

Propriety of execution of search warrant at nighttime, 26 A.L.R.3d 951.

Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Officer's ruse to gain entry as affecting admissibility of plain-view evidence—modern cases, 47 A.L.R.4th 425.

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Propriety of state or local government health officer's warrantless search — post-Camara cases, 53 A.L.R.4th 1168.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.LR.4th 391.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

Necessity that Miranda warnings include express reference to right to have attorney present during interrogation, 77 A.L.R. Fed. 123.

Fourth Amendment as prohibiting strip searches of arrestees or pretrial detainees, 78 A.L.R. Fed. 201.

Key Numbers. — Searches and Seizures ⇐ 2, 7(1).

Sec. 15. [Freedom of speech and of the press — Libel.]

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

HISTORICAL NOTES

Proposal and Ratification of Amendments 1 to 10

The first ten amendments to the Constitution of the United States, which comprise the Bill of Rights, set out in 1 Stat. 97, were proposed to the Legislatures of the several States by the First Congress, on September 25, 1789. They *were ratified by the following States*, and the notifications of ratification by the governors or secretaries of state thereof were communicated successively by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. The Legislatures of Connecticut, Georgia, and Massachusetts ratified them on April 19, 1939, March 18, 1939, and March 2, 1939, respectively.

Twelve articles were proposed on September 25, 1789. The first two, which failed of adoption, read as follows:

"Art. I. After the first enumeration required by the first article of the Constitution, there shall be one representation for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand persons.

"Art. II. No law varying the compensation for the services of the senators and representatives shall take effect, until an election of representatives shall have intervened."

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebel-

lion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

HISTORICAL NOTES

Proposal and Ratification

This amendment was proposed to the legislatures of the several States by the Thirty-ninth Congress, on June 13, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified by the legislatures of thirty of the thirty-six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; Ohio, Jan. 4, 1867; New York, Jan. 10, 1867; Kansas, Jan. 11, 1867; Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Michigan, Jan. 16, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869; Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901; Maryland, Apr. 4, 1959; California, May 6, 1959; and Kentucky, Mar. 18, 1976.

The Fourteenth Amendment originally was rejected by Delaware, Georgia, Louisiana, North Carolina, South Carolina, Texas and Virginia. However, the State Legislatures of the aforesaid States subsequently ratified the amendment on the dates set forth in the preceding paragraph. Kentucky and Maryland rejected this amendment on Jan. 10, 1867 and Mar. 23, 1867, respectively.

The States of New Jersey, Ohio and Oregon "withdrew" their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 15, 1868, respectively.

The State of New Jersey expressed support for this amendment on Nov. 12, 1980.

CHAPTER 33
DECLARATORY JUDGMENTS

78-33-1. Jurisdiction of district courts — Form — Effect.

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-33-1.

Cross-References. — Jurisdiction of district court, § 78-3-4.

Submitting controversy without action, § 78-11-11.

NOTES TO DECISIONS

ANALYSIS

Construction and application.

The Declaratory Judgments Act (§§ 78-33-1 to 78-33-13) is not designed for giving advisory opinions in a nonadversary action, or to insure against feared risk. Backman v Salt Lake County, 13 Utah 2d 412, 375 P2d 756 (1962).

Court's lack of jurisdiction.

There was no case or controversy ripe for adjudication in an attorney's suit against the Utah State Bar where the Utah State Bar had barely begun a preliminary investigation into an allegation of unauthorized practice of law, and, as a result, no accrued set of facts existed to support attorney's claim, and the attorney had merely received two letters of inquiry from the bar Barnard v. Utah State Bar, 857 P.2d 917 (Utah 1993).

— Procedure.

Proper procedure with respect to defendant's claim that justice of the peace court lacked subject matter jurisdiction was a petition for an extraordinary writ, and not a declaratory judgment action McRae & DeLand v. Feltch, 669 P2d 404 (Utah 1983).

Dismissal.

— Effect.

Dismissal of teacher's suit for declaratory judgment determining status under Teachers Retirement Act for lack of jurisdiction was not res judicata barring subsequent mandamus

Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTAH SAFE TO LEARN-SAFE TO WORSHIP COALITION, INC., d/b/a SAFE HAVENS FOR LEARNING, a Utah non-profit corporation, Plaintiff, vs. THE STATE OF UTAH, a governmental entity; OLENE WALKER, in her official capacity as Lieutenant Governor of the State of Utah; and MARK SHURTLEFF, in his official capacity as Attorney General of the State of Utah, Defendants.	 MEMORANDUM DECISION Case No. 030909591 Hon. J. DENNIS FREDERICK Court Clerk: Cindy Beverly June 19, 2003

The above-entitled matter comes before the Court pursuant to Plaintiff's Motion and Defendants' Cross Motion for Summary Judgment as well as Defendants' Motion to Dismiss (Justiciability). The Court heard oral argument with respect to the motions on June 16, 2003. Following the hearing, the matters were taken under advisement.

The Court having considered the motions, memoranda, exhibits attached thereto and for the good cause shown, hereby enters the following ruling.

Safe Havens is an organization which is attempting to pass a

law banning concealed weapons in Utah schools. After filing its application to circulate a petition to have the matter voted on by ballot initiative (with the Lieutenant Governor in March 2003), the Elections Office informed Safe Havens that it will have to comply with certain of the requirements in the Utah Election Code (which took effect May 5, 2003). With this Complaint, Safe Havens contends retroactive application of the law is improper and, consequently, Safe Havens seeks a declaratory judgment that it need not comply with the new rules. To the extent this Court finds that the statutory amendments can be applied retroactively, Safe Havens seeks a judgment that many of the recent changes to the Election Code are unconstitutional and asks this Court to clarify what Safe Havens must do to qualify for the 2004 general election.

Turning first to Defendants' Motion to Dismiss (Justiciability), the record in this matter makes clear two of the provisions of SB 28 are not being enforced against plaintiff. Specifically, the public hearing requirement and the provision disallowing the Lieutenant Governor from being able to approve for circulation an initiative if a similar one had been submitted within the previous two years, are not being applied against the plaintiff. This having been said, even liberally construing the Declaratory Judgment Act, as urged by plaintiffs, the Court is

not persuaded a justiciable controversy exists between the parties concerning those sections. Indeed, without a threat of enforcement of such claims against the plaintiff, the Court would merely be rendering an improper advisory opinion. Accordingly, defendants' motion is granted.

With respect to plaintiff's Motion for Summary Judgment, after reviewing the relevant law, the Court finds defendants are not applying the Code provisions retroactively, but rather, if and when plaintiff submits the signature sheets to the county clerks, they will apply the law in effect at that time to determine if there are sufficient signatures. In addition, when the signatures are submitted, the clerks will apply the current law to determine if the signatures have been submitted within a timely fashion (within one year of the effective date of the Act.) This is not a retroactive application of law, but rather, the application of law in effect at the time the governmental decision is made. Moreover, in Owens v. Hunt, 882 P.2d 660, 661 (Utah 1994), the Utah Supreme Court specifically held that the initiative process can change during the pendency of an initiative. Id. at 661. As to the case of Gallivan v. Walker, 54 P.3d 1069 (Utah 2002), although the Court did reference concerns with the "undue burdening" of fundamental rights, that case clearly concerns itself with the uniform operation of laws clause

of the Utah Constitution and was based upon the determination by the court that the multi-county signature requirement (requiring signatures equal to 10 percent of the number of voters for governor in the last election in each of 20 of 29 counties) was a discriminatory classification which impermissibly discriminated between urban and rural voters and counties. In this case, in response to Gallivan, there is no similar discriminatory classification as SB 28 requires the signatures be gathered in each of 26 of 29 senate districts, which are population-based and evenly divided. Further, the other challenged provision, requiring initiatives to qualify within one year, creates no discriminatory classification, nor is it a burden on qualifying an initiative to be on the ballot.

With respect to plaintiff's arguments surrounding free speech, such are not implicated by any of these initiative provisions. Free speech and the right to vote are not concerned, necessarily, in initiative procedures, but only if the State attempts to regulate speech associated with the initiative process. Palisade Fruitlands v. Todd, 279 F.3d 1204 (10th cir. 2002).

Based upon the forgoing, the Court does not reach the arguments regarding severability. Defendants' Cross Motion for Summary Judgment is granted and Plaintiff's Motion for Summary

Judgment is, respectfully, denied.[1]

DATED this 19th day of June, 2003.

J. DENNIS FREDERICK
DISTRICT COURT JUDGE

[1]The Court notes that in light of the ruling with respect to justiciability, this may not be the best case for challenging the constitutionality of the new Election Code requirements. Specifically, although the burdens remaining to be addressed at this juncture do not in and of themselves create an undue burden, if at some later date, all five requirements were to be considered by the Court, the outcome may not be the same.

Tab C

THOM D. ROBERTS (#2773)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General
Attorney for Defendant Walker
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353

IN THE THIRD JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY, STATE OF UTAH

UTAH SAFE TO LEARN – SAFE TO WORSHIP COALITION, INC., dba SAFE HAVENS FOR LEARNING, a Utah non-profit corporation, Plaintiff, vs. THE STATE OF UTAH, a governmental entity; OLENE WALKER, in her official capacity as Lieutenant Governor of the State of Utah; and MARK SHURTLEFF, in his official capacity as Attorney General of the State of Utah, Defendants.	ORDER AND JUDGMENT Case No. 030909591 Judge J. Dennis Frederick

The above entitled matter, having come before the Court, the Honorable J. Dennis Frederick, District Court Judge presiding, on Monday, June 16, 2003, and the Court, having reviewed the Motions and Memorandums filed by the parties, the affidavits and stipulated

facts. the argument of counsel. and being fully advised in the premises and having previously made and entered its Memorandum Decision, and based thereon, it is hereby

ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss (Justiciability) shall be and the same is hereby granted; it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment shall be and the same is hereby denied; it is further

ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for Summary Judgment shall be and the same is hereby granted; it is further

ORDERED, ADJUDGED AND DECREED that this Order and Judgment resolves all of the claims of the parties and that each party shall bear their own costs and attorneys fees.

Dated this 30th day of June, 2003.

THIRD DISTRICT COURT

J. DENNIS FREDERICK
DISTRICT COURT JUDGE

Approval as to form:

John A. Pearce
Attorney for the Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the above **ORDER GRANTING LEAVE TO FILE OVER LENGTH MEMORANDUM** on the 24 day of June, 2003 to:

John A. Pearce
Ryan M. Harris
JONES WALDO HOLBROOK & MCDONOUGH
1500 Wells Fargo Plaza
170 S Main St
PO Box 45444
Salt Lake City, UT 84145-0444

Lisa Watts Baskin
819 E Springwood Dr
North Salt Lake, UT 84054